88-479

No.

Supreme Court, U.S.
FILED
SEP 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1988

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MARION D. CAMPBELL,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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September 20, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## QUESTIONS PRESENTED

1. Whether two conspiracy charges, each involving substantially the same time, persons, places and events, allege a single conspiracy for purposes of the Double Jeopardy Clause.

2. Whether the Double Jeopardy Clause bars successive prosecution of a defendant for a lesser included offense where the sovereign has previously prosecuted the defendant for a greater offense, the proof of which required sufficient evidence to establish guilt under the second offense.

3. Whether the Double Jeopardy Clause collaterally estops prosecution of a defendant for conspiracy, where a previous trier of fact necessarily found that defendant was not a participant in that conspiracy.

## LIST OF PARTIES

Roger Benton was an additional party in the proceeding below.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

Marion D. Campbell hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App., *infra*, 1a) is not yet reported. The opinion of the United States District Court for the Eastern District of Kentucky (App., *infra*, 26a) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on July 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides that:

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . .

U.S. Const. amend. V.

Section 1951 of Title 18 of the United States Code provides, in relevant part, that:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. . . .

18 U.S.C. § 1951

Section 841 of Title 21 of the United States Code provides, in relevant part, that:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . .

21 U.S.C. § 841

Section 846 of Title 21 of the United States Code provides, in relevant part, that:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 846

## STATEMENT OF THE CASE

1. Petitioner Marion D. Campbell is a former commissioner of the Kentucky State Police. During the time relevant to this case, petitioner held the rank of captain, the highest permanent rank recognized by the Kentucky State Police. From January 4, 1983, until July 31, 1985, petitioner served as Commander of the Morehead State Police Post. Campbell at Tr. XIII, 26-27. On August 1, 1985, petitioner was transferred to the State Police Special Investigations Section for Eastern Kentucky. Campbell at Tr. XIII, 71.

On March 12, 1986, an indictment was returned in the United States District Court for the Eastern District of Kentucky naming the following as defendants: petitioner; Morgan County, Kentucky Sheriff Roger Benton; Morgan County, Kentucky Judge Executive Gene Allen; Gene Allen's son Steve Allen and Titus Frederick. Docket Entry 1. Count 1 of the indictment charged the five defendants with conspiring between January 1, 1985 and February 11, 1986 to affect interstate commerce through extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951. This Hobbs Act count specifically charged the defendants with conspiring to extort money and cocaine from Federal Bureau of Investigation undercover agent Houston E. McNeal. Count 16 charged the same five defendants, during the same time period, with violating 21 U.S.C. § 846 by conspiring to distribute and to possess with in-

tent to distribute cocaine and marijuana, in violation of 21 U.S.C. § 841.

Gene Allen, Steve Allen and Titus Frederick all entered into plea bargains with the Government. Gene Allen at Tr. VII, 146-49; Steve Allen at Tr. V, 87-89; Frederick at Tr. V, 65-76. Petitioner and Roger Benton stood trial beginning on January 8, 1987. At trial, a Government witness testified to discussions among the defendants regarding trafficking in narcotics beginning in 1983. Gene Allen at Tr. V, 187-92. In January 1985, Frederick and Gene Allen approached Special Agent McNeal, who was posing as a narcotics dealer, with the suggestion that he supply them with cocaine. They further represented that petitioner would provide protection for the cocaine operation. McNeal at Tr. II, 20-26. McNeal later flew into Kentucky a shipment of two kilos of cocaine, which he "sold" to two other FBI agents in the presence of Frederick and Gene Allen. McNeal at Tr. II, 73-79.[1] In addition, on three other occasions either Frederick or Gene Allen solicited and received money from McNeal which they stated would be passed on to petitioner in exchange for McNeal's "protection." McNeal at Tr. II, 65-66, 82; III, 44. McNeal, however, made no direct payments to petitioner. McNeal at Tr. III, 101-02.

In his defense, petitioner introduced evidence that he was conducting an investigation into narcotics trafficking in eastern Kentucky between 1983 and 1986. He testified that he believed Frederick and Gene Allen were assisting him in this investigation. Campbell at Tr. XIII, 31-33, 50, 54-62.[2] Petitioner further testified that he never received any payments from McNeal (Campbell at Tr. XIII, 86-87) and that he was aware of no activities by

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[1] Petitioner was not made aware of this event. Campbell at Tr. XIII, 139.

[2] Gene Allen had previously provided information to petitioner in connection with other investigations. Gene Allen at Tr. VI, 131-33; Campbell at Tr. XIII, 34.

either Frederick or Gene Allen that were inconsistent with the conduct of his investigation. Campbell at Tr. XIII, 91, 165-66.

The jury found Benton guilty on all counts. Petitioner was acquitted of conspiring to violate the Hobbs Act and of several substantive violations of the Hobbs Act. On Count 16, the drug conspiracy count, the jury was unable to agree as to petitioner's guilt or innocence. The court therefore declared a mistrial. Docket Entry 165.

2. On February 17, 1987, the Government moved to set a new trial date for petitioner on Count 16. Docket Entry 173. On February 27, petitioner moved to dismiss Count 16 on the ground that his retrial on that count would violate the Double Jeopardy Clause of the United States Constitution. Docket Entry 181. On March 4, the Government returned a superseding indictment containing a single count charging petitioner with conspiracy in violation of 21 U.S.C. § 846. Docket Entry 183. This count was identical in all material respects to Count 16 of the original indictment—except that it alleged a conspiracy extending from November 1, 1983 through March 12, 1986 (instead of January 1, 1985 through February 11, 1986) and that it named only Frederick and Gene Allen (and not Benton and Steve Allen) as petitioner's co-conspirators. The Government did not move to dismiss the original Count 16, and that count never has been dismissed.

On March 20, 1987, the district court denied petitioner's motion to dismiss, which it treated as applicable both to the superseding indictment and to the original Count 16. App., *infra*, 26a-30a. Petitioner appealed the denial of his motion to the United States Court of Appeals for the Sixth Circuit.[3]

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[3] A denial of a pretrial motion to dismiss on grounds of double jeopardy is an appealable final order under 28 U.S.C. § 1291. *Abney* v. *United States*, 431 U.S. 651, 656-62 (1977); *see* App., *infra*, 31a-32a.

The court of appeals affirmed. App., *infra*, 1a-25a. The court held that the alleged drug conspiracy under the superseding indictment and the original Count 16 was not exactly the same as the alleged extortion conspiracy under the original Count 1. Accordingly, it held that petitioner's retrial for the alleged drug conspiracy following his acquittal under the Hobbs Act was not barred either as a lesser included offense or under principles of collateral estoppel.[4]

## REASONS FOR GRANTING THE PETITION

The primary purpose of the constitutional prohibition against double jeopardy is "to preserve the finality of judgments in criminal prosecutions and to protect the defendant from prosecutorial overreaching." *Garrett* v. *United States*, 471 U.S. 773, 795 (1985) (O'Connor, J., concurring). "A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial." *United States* v. *Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion of Harlan, J.). The Double Jeopardy Clause thus absolutely prohibits the State from "subjecting [an individual] to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U.S. 184, 187-88 (1957). The Constitution mandates especially close scrutiny of any attempt to reprosecute a defendant following an initial trial in order to protect the individual from this kind of abuse. *See, e.g., Sanabria* v. *United States*, 437 U.S. 54, 63-64 (1978); *Brown* v. *Ohio*, 432 U.S. 161, 165-66 (1977); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568-69 (1977).

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[4] Petitioner's retrial has been set for February 13, 1989.

This case involves precisely the sort of dangers against which the Double Jeopardy Clause was designed to guard. On the basis of limited and vulnerable evidence tying petitioner to a conspiracy involving trafficking in drugs, the United States elected to prosecute petitioner not only for a conspiracy to possess and distribute drugs, but also for the more encompassing offense of conspiracy to commit extortion. The United States was firmly rebuffed when the jury acquitted petitioner of the extortion conspiracy, necessarily finding that petitioner did not conspire as alleged by the prosecution. Chastened by its past overreaching, the Government now seeks to reprosecute petitioner only on the lesser included offense of the drug conspiracy, using a superseding indictment that expands its allegations as to the time period involved and restricts its allegations as to the persons involved. The court of appeals' holding, affirming such a reprosecution over petitioner's challenge, is in contravention of constitutional policy and of the reasoning and holdings of this and other courts. This dangerous erosion of the Double Jeopardy Clause warrants review by this Court.

## I. THE DRUG DISTRIBUTION AND EXTORTION ALLEGATIONS INVOLVE ONLY A SINGLE CONSPIRACY.

The fundamental error underlying the court of appeals' rejection of petitioner's legal arguments is its failure to recognize that the indictments in this case alleged only a single conspiracy. If this case involved separate conspiracies to distribute drugs and to commit extortion, then clearly petitioner's acquittal under the Hobbs Act conspiracy would not bar his retrial under the drug conspiracy charge. However, the fact that both charges arise out of a single conspiracy means that acquittal on the one charge precludes retrial on the other.[5] The Sixth Cir-

[5] The Double Jeopardy Clause absolutely bars the imposition of two sentences for one conspiracy under a single conspiracy statute. *Braverman* v. *United States*, 317 U.S. 49 (1942). A single agree-

cuit's conclusion that this case involves two conspiracies is supported only by its arbitrary and mechanical application of a test intended to aid the court in addressing the underlying question of whether the "agreements" are in fact identical. This Court should grant certiorari in order to review the Sixth Circuit's fundamental misapplication of federal constitutional law.

The task of determining whether multiple conspiracy allegations arise out of one or several agreements is often a difficult one. *Cf. Kotteakos* v. *United States*, 328 U.S. 750 (1946). The courts have recognized that allegations of different overt acts do not in themselves establish different conspiracies because many large conspiracies involve several overt acts which could, if the rules against double jeopardy are not vigilantly enforced, be used to support unwarranted multiple prosecutions. For this reason, most lower courts have adopted a "totality of the circumstances" test, under which the court examines the similarities and differences of the two alleged conspiracies with regard to a variety of factors in order to arrive at an ultimate determination whether they are essentially one conspiracy.[6] The underlying purpose of this test is

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ment may, however, violate two different conspiracy statutes. *Albernaz* v. *United States*, 450 U.S. 333, 344 n.3 (1981). Because the Government has alleged violations of different conspiracy statutes, *Braverman* does not on its face mandate that petitioner's Hobbs Act acquittal bars his further prosecution for drug conspiracy. Nonetheless, the principles that underlie *Braverman* and its progeny govern the determination of whether a single or multiple conspiracies existed for purposes of the Double Jeopardy Clause.

[6] The Sixth Circuit has articulated the test as follows:

> The test requires the trial court, in determining whether two conspiracies arise from a single agreement, to consider the elements of: (1) time; (2) persons acting as co-conspirators; (3) the statutory offenses charged in the indictments; (4) the overt acts charged by the government or any other description of the offenses charged which indicates the nature and scope of the activity which the government sought to punish in each

to determine whether the events of the two alleged conspiracies constitute "two discrete patterns of activity" or a "single design." *United States* v. *Marable*, 578 F.2d 151, 156 (5th Cir. 1978).

In concluding that this case involved two separate conspiracies, the court of appeals grossly misapplied the totality of the circumstances test. App., *infra*, 12a-14a. The court's methodology flatly contradicted both the policy of the Double Jeopardy Clause and the practice of other circuits.

Initially, the court found it important that the drug conspiracy alleged in the superseding indictment covered a greater time period than the extortion conspiracy alleged in Count 1. App., *infra*, 12a. This analysis, however, ignores the more important fact that in the original indictment, both conspiracy allegations—the Hobbs Act and drug conspiracy—covered *exactly* the same time period. This is powerful evidence that the government itself, as well as the original grand jury, considered both counts as arising out of a single agreement.[7]

By focusing solely on the superseding indictment, the court failed in its obligation to examine the identity of the agreements in light of all the circumstances of the case. *See United States* v. *Ragins*, 840 F.2d 1184, 1189-91 (4th Cir. 1988) (court must look at indictment as a whole, not only counts naming defendant); *cf. Sanabria*, 437 U.S. at 71-74 (Government held to original theory that case involved a single gambling business). Furthermore, even if the court properly could restrict the inquiry to the superseding indictment, the time period of the alleged

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case; and (5) places where the events alleged as part of the conspiracy took place.

*United States* v. *Sinito*, 723 F.2d 1250, 1256 (6th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984).

[7] The Government's view of the two allegations as arising out of a single agreement is further supported by its closing argument, which set out this theory before the jury. Tr. XVI, 58-61.

extortion conspiracy is subsumed entirely within that of the drug conspiracy. Several courts have held that this relationship suggests that one conspiracy is a part of the other, not that they are separate agreements. *See, e.g., United States* v. *Liotard*, 817 F.2d 1074, 1079 (3d Cir. 1987); *United States* v. *Castro*, 629 F.2d 456, 462-63 (7th Cir. 1980); *cf. Brown*, 432 U.S. at 169 (prosecutors may not avoid the Double Jeopardy Clause "by the simple expedient of dividing a single crime into a series of temporal or spatial units").

Second, the court of appeals relied on the fact that the superseding indictment named fewer co-conspirators than the original Count 1. App., *infra*, 12a. Again, this analysis simply ignored the identity of the persons named in both counts of the original indictment. Furthermore, both indictments named the same core co-conspirators; the superseding indictment merely omitted the peripheral actors, Roger Benton and Steve Allen. This identity of the principal players again powerfully indicates a single conspiracy. *See Ragins*, 840 F.2d at 1190; *Liotard*, 817 F.2d at 1079; *Marable*, 578 F.2d at 155.

Finally, the court of appeals gave great weight to the fact that the two counts alleged violations of different statutes. App., *infra*, 12a-13a. This is, however, at best a minor factor in determining whether there is a single conspiracy. "[O]ne agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." *Braverman*, 317 U.S. at 53. Because of the frequency with which a single course of conduct may violate multiple statutes, at least one circuit has held that a variance in statutory provisions is no consideration at all in determining the existence of single or multiple conspiracies. *Liotard*, 817 F.2d at 1078 n.7. The dispositive weight accorded to this factor by the Sixth Circuit directly conflicts with the Third Circuit's position, which gives the factor no weight.

In sum, the two allegations in this case involve alleged conspiratorial activity over a single time period, involving substantially the same persons, and arising out of a common core of events.[8] Under the totality of the circumstances test as applied by most of the circuits, these similarities establish a single conspiracy. *See United States* v. *Tercero*, 580 F.2d 312 (8th Cir. 1978); *Marable*, *supra*. The Sixth Circuit, however, used the totality of the circumstances test, not as a flexible tool for illuminating the substantial identity of allegedly separate agreements, but as a rigid instrument for isolating any variances which could justify treating the agreements as separate. Thus, the totality of the circumstances test in the Sixth Circuit has become a vehicle for rendering the Double Jeopardy Clause a nullity. Because other courts of appeals still apply that standard in a way that provides substantial protection to criminal defendants under the Double Jeopardy Clause, this Court should grant certiorari to resolve the conflict among the circuits concerning the proper application of the totality of the circumstances test.

## II. RETRIAL ON THE DRUG CONSPIRACY CHARGE IS BARRED BECAUSE IT IS A LESSER INCLUDED OFFENSE OF THE HOBBS ACT CONSPIRACY OF WHICH PETITIONER HAS BEEN ACQUITTED.

### A. The Drug Conspiracy Is A Lesser Included Offense Under The Test Traditionally Used In Cumulative Sentencing Cases.

Although the prohibition against double jeopardy consists of only a single clause in the Constitution, it has been recognized that that clause embodies three separate constitutional protections:

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[8] In fact, at least eight of the overt acts alleged in Count 1 of the indictment describe activity immediately directed toward possession of cocaine with intent to distribute. Docket Entry 1, Indictment, 3-5 (overt acts 1-5, 7, 10, 13).

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

*North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969); *Illinois* v. *Vitale*, 447 U.S. 410, 415 (1980).

In *Blockburger* v. *United States*, 284 U.S. 299 (1932), this Court developed a test for determining whether two offenses are the same for purposes of cumulative sentencing:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

284 U.S. at 304. The *Blockburger* test was originally designed as an aid to determining whether Congress intended to permit multiple sentences for a single act. *See Albernaz* v. *United States*, 450 U.S. at 337; *Whalen* v. *United States*, 445 U.S. 684, 691-92 (1980). However, the test also is applied in cases involving successive prosecutions. If two offenses are the same under the *Blockburger* test, then the Double Jeopardy Clause bars successive prosecution for those offenses as well as multiple sentencing. *Vitale*, 447 U.S. at 415-16; *Brown* v. *Ohio*, 432 U.S. at 166.

As formulated, "the *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial." *Vitale*, 447 U.S. at 416. Thus, the use even of identical evidence in support of each of two charges will not in itself preclude cumulative sentencing. The test does not, however, require the defendant to show that any violation of one statute will *always* con-

stitute a violation of the other in order to implicate double jeopardy concerns. Rather, double jeopardy attaches if the conduct used by the government to prove the greater offense necessarily also establishes the lesser offense.

For example, this Court has held that a defendant cannot be sentenced both for rape and for felony murder predicated upon the same rape. *Whalen*, 445 U.S. 684. Similarly, in a case involving successive prosecutions, a defendant's conviction for felony murder based on a killing during the course of an armed robbery bars a subsequent prosecution for the same robbery—a lesser included offense of the first prosecution. *Harris* v. *Oklahoma*, 433 U.S. 682 (1977). The same principle applies even if the lesser included offense is tried first. Once a defendant has been convicted of careless failure to reduce speed, that failure to reduce speed cannot subsequently be used to establish recklessness in a prosecution for involuntary manslaughter. *Vitale*, 447 U.S. at 419-21.

The two conspiracy charges against petitioner appear to constitute the "same offense" under the analysis used in *Vitale* and *Harris*. Under the extortion theory which the Government unsuccessfully employed to prosecute petitioner for violating the Hobbs Act, the elements of the offense were: (1) a conspiracy, (2) to affect interstate commerce, (3) by obtaining property from another, (4) with his consent, (5) induced under color of official right. Under 21 U.S.C. § 846, the elements of the Government's case are: (1) a conspiracy, (2) to possess marijuana or cocaine, (3) with intent to distribute.

Clearly, not every violation of the Hobbs Act also violates Section 846. There are, in fact, many alternative means of satisfying the elements of a Hobbs Act violation which do not establish a drug conspiracy. However, under the theory used by the government in this case, proof of petitioner's participation in a Hobbs Act conspiracy would also constitute proof of a conspiracy to

violate Section 846. First, proof that petitioner conspired for purposes of the Hobbs Act satisfies the first element, the conspiracy requirement, of Section 846. *See* pp. 7-11, *supra*. Second, the alleged effect upon interstate commerce was the intentional distribution of cocaine; proof of such an "effect" necessarily would satisfy the third element of the Section 846 charge. Finally, the alleged basis of the extortion under color of official right was the defendants' efforts to obtain money, cocaine and a role in the cocaine distribution operation of Special Agent McNeal. This constitutes an effort unlawfully to possess cocaine, which satisfies the second element of the Section 846 offense. Thus, if the government had succeeded in proving the Hobbs Act conspiracy, all of the elements of the Section 846 charge would necessarily have been satisfied.

The court of appeals rejected petitioner's lesser included offense argument with the accurate, but incomplete, observation that "every violation of 18 U.S.C. § 1951 does not entail a violation of 21 U.S.C. § 846." App., *infra*, 17a. Clearly, that is not the proper analysis on this issue. The relevant question is not whether *every* Hobbs Act conspiracy also violates the drug conspiracy statute, but rather whether every violation of the Hobbs Act *as alleged* at the first trial constitutes a drug conspiracy. The court of appeals failed even to ask this question. This Court should grant this petition to clarify the application of the *Blockburger* test where, as here, criminal statutes may be violated by alternative means.

**B. The Drug Conspiracy Is A Lesser Included Offense Under The Broader Test Applicable To Successive Prosecution Cases.**

Even if the Hobbs Act conspiracy and drug conspiracy allegations here were not the "same offense" under the case law concerning cumulative sentencing, the Constitution would still forbid petitioner's prosecution under Section 846 following his Hobbs Act acquittal. In cases

involving cumulative sentencing, the only relevant question is whether the legislature intended the crimes in question to be punishable as separate offenses. Under these circumstances, the *Blockburger* rule of construction is the sole test (absent direct evidence of legislative intent) of when the Double Jeopardy Clause restricts sentencing discretion. *See* p. 12, *supra*.

The constitutional proscription against successive prosecutions, however, serves the additional purpose of ensuring "that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence." *Ohio* v. *Johnson*, 467 U.S. 493, 498-99 (1984). This Court has recognized on several occasions that successive prosecutions may sometimes be barred even where cumulative sentencing for two offenses is permitted under *Blockburger*. *See Brown*, *supra*, 432 U.S. at 166 n.6; *Ashe* v. *Swenson*, 397 U.S. 436, 446 (1970); *cf. Garrett* v. *United States*, *supra*, 471 U.S. at 786. The relevant question is whether, under the circumstances, permitting a second prosecution risks "the type of oppressive practices at which the double-jeopardy prohibition is aimed." *Richardson* v. *United States*, 468 U.S. 317, 324 (1984), quoting *Wade* v. *Hunter*, 336 U.S. 684, 688-89 (1949).

Viewing the question in light of these policies, "the principles of finality and prevention of prosecutorial overreaching" require that a second prosecution be barred whenever the evidence necessary to support a conviction in the first trial also would be sufficient to establish guilt in the second. *Johnson*, *supra*, 467 U.S. at 501; *see In re Nielsen*, 131 U.S. 176, 188 (1889). Any situation in which the sovereign is permitted to bring multiple prosecutions arising out of a single transaction poses a serious danger of prosecutorial abuse. *See Ashe*, *supra*, 397 U.S.

at 448-60 (Brennan, J., concurring). This danger is enhanced when the second prosecution requires proof of no fact beyond that which had to be established in the first case.

In such a situation, the danger is substantial that the prosecutor may first seek to convict upon a theory beyond the scope of the evidence, and only later, after testing the strengths and weaknesses of his case, bring a second prosecution under a narrower theory properly tailored to fit the facts. Such practice constitutes an abuse of the power of the United States to refine its case at the defendant's expense. At the same time, there is no substantial public interest in permitting prosecutors to overcharge at a defendant's first trial while reserving the power to remedy the defect at a second trial. *See Garrett*, *supra*, 471 U.S. at 796-97 (O'Connor, J., concurring); *Jorn*, *supra*, 400 U.S. at 483-84 (plurality opinion of Harlan, J.). Where all the evidence is available to a prosecutor in advance of trial, the Government should be required to limit the charges to those that the evidence will support. If it fails to do so, the Double Jeopardy Clause protects a defendant from having to stand a second trial due solely to the prosecutor's original overzealousness.[9]

This Court never has addressed the specific question whether a different test of lesser included offenses is appropriate in successive prosecution cases as opposed to

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[9] These considerations are fully applicable where, as here, the original indictment charges both the greater and the lesser offense and the jury is unable to agree on the lesser. The defendant's burden in having to stand trial twice is in no way eased by being subjected to two charges in the first trial. Moreover, the decision to bring the meritless greater charge may itself have influenced the original mistrial on the lesser charge, thereby compromising the interests of defendant. *Cf. Price* v. *Georgia*, 398 U.S. 323 331-32 (1970) (discussing potential influence of murder charge on manslaughter conviction).

cumulative punishment cases.[10] Several circuit courts have, however, adopted a "same evidence" test, under which "the second prosecution is barred by double jeopardy if the evidence actually used to prosecute the first offense would suffice to convict of the second offense as charged." *Ragins*, *supra*, 840 F.2d at 1188; *see Jordan* v. *Virginia*, 653 F.2d 870 (4th Cir. 1980); *United States* v. *Sabella*, 272 F.2d 206, 210-12 (2d Cir. 1959).[11] Under this standard, petitioner's subsequent prosecution under Section 846 plainly is barred following his acquittal under the Hobbs Act. The drug conspiracy charge required no additional evidence beyond that which the Government introduced in its earlier Hobbs Act prosecution. *See supra*, pp. 13-14.

The court of appeals—by relying exclusively on the *Blockburger* test in a case involving successive prosecutions—created a direct conflict with the Second and Fourth Circuits, both of which apply a "same evidence"

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[10] In *United States* v. *Woodward*, 469 U.S. 105 (1985), this Court upheld a defendant's sentencing for both willful failure to file a currency report (31 U.S.C. § 5322) and making false statements (18 U.S.C. § 1001), despite the fact that the Government's proof on the charge of failure to report necessarily also established a false statement. Based on the fact that proof of a currency reporting violation "does not necessarily include proof of a false statement offense," as well as the legislative history and other evidence of Congress' intent, the Court concluded that "Congress intended respondent's conduct to be punishable under [both statutes]." To the extent that the Court's analysis in *Woodward* may be inconsistent with its holdings in cases such as *Vitale* and *Harris*, that discrepancy may be explained by the fact that *Vitale*, like this case, involved successive prosecutions, whereas *Woodward* involved only cumulative punishment. *See supra*, pp. 12-13.

[11] *See also Davis* v. *Herring*, 800 F.2d 513, 516-19 (5th Cir. 1986) (discussing "same evidence" test with approval but finding it unnecessary to adopt that test on the facts before it).

test in successive prosecution cases.[12] This Court should grant the petition in order to resolve this important conflict regarding the right to be free from successive prosecutions.

## III. PETITIONER'S RETRIAL ON THE DRUG CONSPIRACY CHARGE IS BARRED BY COLLATERAL ESTOPPEL.

It is well established that the Double Jeopardy Clause mandates the application of collateral estoppel principles to criminal cases. *Ashe* v. *Swenson*, 397 U.S. 436 (1970). "Collateral estoppel" requires that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. Collateral estoppel is an integral part of the bar on double jeopardy because it "protects a man who has been acquitted from having to 'run the gauntlet' a second time." *Id.* at 446. Thus, if the trier of fact in acquitting a defendant necessarily decided an issue of fact in the defendant's favor, that defendant cannot later be tried for another offense if its proof requires the same issue of fact to be decided against him.

The question of whether the trier of fact necessarily decided an issue in the defendant's favor "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id.* at 444, quoting *Sealfon* v. *United States*, 332 U.S. 575, 579 (1948). The practical nature of this inquiry is illustrated by the Court's decision in *Ashe*. Ashe had been previously acquitted by a jury of robbing one of six participants in a poker game. The evidence was uncontradicted that a robbery had occurred and that the victim had been robbed.

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[12] The Ninth Circuit has likewise rejected any expansion of the *Blockburger* test in successive prosecution cases. *United States* v. *Brooklier*, 637 F.2d 620 (9th Cir. 1980), *cert. denied*, 450 U.S. 980 (1981).

Thus, the "single rationally conceivable" ground on which the jury could have acquitted Ashe was that Ashe had not been among the robbers. *Ashe*, 397 U.S. at 445. Because the jury had made this finding, the state could not later prosecute Ashe for robbing another participant in the same game. *Id.*[13]

In the present case, the jury's conviction of Roger Benton under Count 1 makes clear that it found a conspiracy to exist and that it found, with respect to that conspiracy, that all the elements of a Hobbs Act violation were satisfied. The only rational ground upon which the jury could have based its acquittal of petitioner, then, was that he did not participate in that conspiracy. If petitioner did not participate in the Hobbs Act conspiracy, however, he also did not participate in the identical conspiracy to possess a controlled substance with intent to distribute. *See* pp. 7-11, *supra*. Because the Double Jeopardy Clause forbids the Government from relitigating this issue, petitioner's retrial on the drug conspiracy count is barred.

The court of appeals rested its contrary conclusion primarily on its belief that Counts 1 and 16 involved discrete conspiracies. App., *infra*, 19a. This conclusion, however, completely ignores the extraordinary overlap of time, persons, places and events between the two allegations. *See* pp. 9-10, *supra*. The court also believed that "[e]ven assuming that only one discussion among the criminal defendants occurred, the jury could have merely found . . . that Campbell had simply not agreed to commit extortion in violation of the Hobbs Act." App., *infra*, 19a. The court, however, cited no evidence—and no evidence exists—on which the jury could have found that petitioner conspired to possess drugs with intent to distribute but

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[13] *See also Sealfon, supra*, 332 U.S. 575 (jury must have found that defendant did not conspire with a particular individual where only contested issue was the existence of an agreement with that individual).

*not* to commit extortion. In fact, *all* of the evidence that even remotely ties petitioner to the events identified in the original indictment is directly related to the alleged effort to extort Special Agent McNeal. Thus, there is no basis on which a rational jury could have acquitted petitioner on Count 1 without also finding sufficient facts to acquit him on Count 16.[14]

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 20, 1988

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[14] The court also suggested that it could not find collateral estoppel because the Hobbs Act acquittal may have been based only on jury lenity. App., *infra*, 19a. This viewpoint would eviscerate the collateral estoppel doctrine entirely whenever the jury renders a general verdict, for it can never be said with certainty that the jury did not ignore its legal obligation to convict if the evidence established guilt beyond a reasonable doubt. The rational administration of justice requires an assumption that the jury has followed its instructions on the law, just as it requires an assumption that the jury accepted all uncontradicted evidence of fact. *Cf. Ashe, supra*, 397 U.S. at 444 n.9.

# APPENDICES

# APPENDICES

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Nos. 87-5355/87-5361

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.

ROGER BENTON (87-5355) and,
MARION D. CAMPBELL (87-5361),
*Defendants-Appellants.*

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On Appeal from the United States District Court
for the Eastern District of Kentucky

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Decided and Filed July 22, 1988

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Before: GUY and BOGGS, Circuit Judges; and PECK, Senior Circuit Judge.

BOGGS, Circuit Judge. Defendants-appellants Roger Benton (Benton) and Marion D. Campbell (Campbell) were indicted in federal district court, and tried jointly before a jury, on one count of conspiracy to commit extortion, and several substantive counts of extortion under the Hobbs Act, 18 U.S.C. § 1951,[1] and one count

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[1] 18 U.S.C. § 1951 states as follows:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity

of conspiracy to distribute cocaine and marijuana under 21 U.S.C. § 846.[2] Campbell was acquitted of the Hobbs Act violations, but the jury was unable to reach a verdict on the conspiracy to distribute drugs count under 21 U.S.C. § 846. Benton, however, was found guilty on all counts.

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in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

[2] 21 U.S.C. § 846 provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." Distribution of cocaine and marijuana is an offense under 21 U.S.C. § 846.

The district court denied Campbell's motion to dismiss the superseding indictment returned by the government, after the district court declared a mistrial because of the hung jury. Campbell essentially argues that the charge of conspiracy to commit extortion under the Hobbs Act, 18 U.S.C. § 1951, on which he was acquitted, is the "same offense" for double jeopardy purposes as the charge of conspiracy to distribute cocaine and marijuana under 21 U.S.C. § 846. Campbell also argues that collateral estoppel, as part of the Fifth Amendment's guarantee against double jeopardy, prevents the government from constitutionally retrying him on the conspiracy to distribute cocaine count in the superseding indictment. We affirm the district court order, permitting the government to retry Campbell on the conspiracy to distribute cocaine count under 21 U.S.C. § 846 in the superseding indictment.

Benton, on the other hand, appeals his convictions on all counts of extortion under the Hobbs Act, 18 U.S.C. § 1951, and conspiracy to distribute cocaine and marijuana under 21 U.S.C. § 846. Benton essentially argues that the district court erred in admitting evidence of certain "prior bad acts" pursuant to Fed. R. Evid. 404(b) and that the district court made other major evidentiary errors. We find that the district court committed no reversible error, and affirm Benton's conviction on all counts.

I

On March 12, 1986, an indictment was returned in district court. Count 1 charged Campbell and Benton with conspiring, with co-defendants Gene Allen, Titus Frederick and Steve Allen, during the period of January 1, 1985 through February 11, 1986, to obstruct, delay, and affect commerce by extortion in obtaining money and cocaine from an undercover FBI agent, McNeal, under color of official right. Count 1 recited that at the time of this conspiracy Campbell was Captain of the Kentucky State Police, and Benton was the Sheriff of Morgan County,

Kentucky. Count 1 generally charged that Campbell received payoffs from undercover agent McNeal through Titus Frederick and Gene Allen. Allen was then Morgan County Judge. Frederick knew each co-defendant. In return for the payoffs, Campbell and Benton allegedly protected a cocaine distribution scheme facilitated by agent McNeal in Morgan County, Kentucky and in other states, and promised to inform McNeal of any state or federal investigations.

Counts 5, 8, and 15 charged Campbell and other co-defendants with various substantive counts of extortion under 18 U.S.C. § 1951. Counts 6, 9, and 12 charged Benton with various substantive counts of extortion under color of official right.

Count 16 charged that, during the period January 1, 1985 through February 11, 1986, Campbell, Benton, Frederick, Allen and his son Steve Allen, attempted and conspired to distribute and possess with intent to distribute cocaine and marijuana in violation of 21 U.S.C. § 846.

Testimony at the trial indicated that the defendants Allen, Benton, Campbell, and Frederick were interested in establishing a drug operation in Morgan County, Kentucky. They would import drugs from Florida into Morgan County and extort money from individuals selling drugs in return for "protection" and the promise that law enforcement officials would not interfere with their drug sales.

Defendant Allen testified at trial that by late 1983, Campbell, a long time friend, had come to him and indicated that drug dealers were making a good deal of money, and that he desired to make some money before he retired. This aspect of Allen's testimony was corroborated by the testimony of Lester H. Burns, Jr. Allen testified that the plan was to obtain drugs through a crooked Deputy Sheriff in Okeechobee, Florida, and fly

the drugs into Morgan County for sale and "split [the proceeds] four ways between [himself], and Roger Benton, Marion Campbell and Titus Frederick." Allen testified that every time he met with Campbell they discussed the drug business. Allen also testified that they approached Burns about financing some of the drug operations, but he refused and they turned their attention to agent McNeal who was posing as a drug dealer. According to Allen, McNeal agreed to supply the cocaine to him, and had also agreed to pay protection money to Allen, Benton and Campbell.

Defendant Frederick testified that in the Fall of 1984, Allen and Campbell came to his house and indicated that "they wanted to get into the dope business and wanted me to help them find a supplier for it." Consistent with Allen's testimony, Frederick testified that Allen and Campbell discussed the possibility of involving attorney Lester Burns to finance a cocaine deal because they understood that he had the money to do it. He further testified that Allen and Campbell wanted to become involved in the drug business because they thought that Frederick knew the people who could get them started. Frederick testified that he, Allen, and Campbell went to Florida to ask Burns to finance their dope business, but Campbell and Burns fell into fundamental disagreement. According to Frederick's testimony, Frederick and Allen discussed supplying cocaine to Morgan County with agent McNeal. Frederick testified that he arranged a meeting of Benton, Allen, himself and McNeal. Agent McNeal testified that Captain Campbell was present at the premises of Lester Burns where the discussion about cocaine took place.

At trial, McNeal testified that on October 30, 1985, the defendants made plans for flying cocaine into Morgan County from somewhere in Florida. He testified that Frederick and Allen had agreed that McNeal should pay $5,000 a month to Allen, Benton, Campbell, and Frederick

for protection, and to keep from getting arrested. The next day he paid Frederick $2,500 for protection from Campbell, and Frederick told McNeal that he would give that money to Campbell. McNeal testified that on November 7, 1985 he explained everything to Benton: that he wanted to fly cocaine into Morgan County, and that he wanted Benton's cooperation and protection. Both Benton and Frederick assured McNeal that he would be notified if he were in danger of being arrested.

McNeal testified that on November 20, 1985 he flew two kilos of cocaine into Morgan County and distributed it at defendant Allen's house to purported buyers who were FBI undercover agents from Indiana. McNeal testified that on December 4, 1985, he went to Frederick's home in Morgan County, and paid Allen $2,500 for protection, Frederick $2,500, and paid $2,500 to be given to Campbell. Before leaving Frederick's home, McNeal telephoned Benton, and agreed to meet on a highway at which time McNeal paid him $2,500 for protection to fly drugs in and out of a Morgan County airport. McNeal testified that at that time he told Benton that he had flown in another load of cocaine, and that everything went well.

On January 9 and 10, 1986, McNeal was in Okeechobee, Florida, where he paid Allen $5,000 for protection, and $5,000 to be given to Campbell. On January 16, 1986, McNeal paid Benton $5,000 for protection. Benton had gone to Florida specifically for the purpose of meeting McNeal and getting paid.

Benton testified that he was conducting his own investigation, and that was the reason for his taking the money from agent McNeal. Campbell made similar statements. However, Sergeant Evans of the Kentucky State Police testified that he worked closely with Campbell, and that Campbell never told him about using Allen or Frederick in the "investigation." Evans also testified that Campbell asked him to testify to having had conversations with Campbell which never happened. Charles

Perry, Chief of the West Liberty Police Department, testified that he never was made aware of any investigation by Benton about drugs or payoffs in Morgan County. Robert Hutchinson, the Commonwealth Attorney of Morgan County, testified that Benton never had any conversation with him about an investigation Benton was conducting.

On February 5, 1987, the jury returned verdicts of not guilty as to Campbell on Counts 1, 5, 8, and 15 (all charging extortion). As to Count 16 (charging conspiracy to distribute drugs), the jury was unable to reach a verdict. The district court thus declared a mistrial as to Count 16. The jury found Benton guilty on all counts of conspiracy to commit extortion, substantive counts of extortion, and conspiracy to distribute drugs.

On February 17, 1987, the government moved to set a new trial dtae for Campbell on Count 16. Campbell moved to dismiss Count 16 on double jeopardy grounds.

On March 4, 1987, the United States returned a superseding indictment, charging Campbell with the same things originally charged in Count 16 of the initial indictment, but deleted any allegation respecting marijuana distribution. The superseding indictment, however, enlarged the time frame of the drug conspiracy charge. The original indictment charged actions from January 1, 1985 and continuing up to and including February 11, 1986. The new indictment charges the time from November 1, 1983, continuing up to and including March 12, 1986, and deletes any allegations respecting marijuana. It also deleted defendants Steve Allen, and already convicted Benton. Testimony at trial indicated that Campbell had gone to Florida in late 1983, and had discussed the possibility of establishing a drug connection with certain Floridians.

We address separately the contentions of Campbell and of Benton.

II

A. CAMPBELL

*a. The Superseding Indictment*

Campbell argues that since jeopardy had terminated as to the original indictment, the superseding indictment returned by the government charging a violation of 21 U.S.C. § 846 is improper. In his view, a superseding indictment returned after a district court has declared a mistrial because of a hung jury on a count or counts in an indictment violates his due process rights under the federal constitution.

In *United States v. Corona*, 804 F.2d 1568, 1571 (11th Cir. 1986), the Eleventh Circuit held, however, that the return of a superseding indictment following a hung jury does not violate the double jeopardy clause, even if that superseding indictment changed the dates on which the crime was alleged to have been perpetrated. There, the government "add[ed] six months at the beginning of the eight year conspiracy and twelve months at the end . . . ." *Id.* at 1569. In our case, the government enlarged the time frame on the conspiracy charge under 21 U.S.C. § 846 from January 1, 1985 through February 11, 1986 to November 1, 1983 through March 12, 1986. The fact that the government in our case deleted certain defendants, and deleted any conspiracy charge respecting marijuana, makes no difference from a constitutional standpoint, as the government may even charge additional conspiracy and substantive counts in a superseding indictment. *Id.* at 1571.

On the other hand, the government argues that *Richardson v. United States*, 468 U.S. 317 (1984) bars any double jeopardy claim that Campbell advances regarding the superseding indictment. Since the original jeopardy never terminated, the government maintains, any retrial of the charge contained in Count 16, or a reformulated charge in the superseding indictment, will be merely a

continuation of the original prosecution and within the original jeopardy.

In *Richardson*, the defendant was acquitted of one substantive narcotics violation under 21 U.S.C. § 841 (a) (1), and the jury was unable to reach a verdict either on another 21 U.S.C. § 841(a) (1) violation or on a count of conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 846. The district court declared a mistrial as to these two remaining counts, and scheduled a retrial. The defendant argued on appeal that the evidence was legally insufficient to convict and, in any case, that the double jeopardy clause prevented retrial following a hung jury.

The Supreme Court held that the "Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." 468 U.S. at 325. "[*A*] *hung jury is* [*not*] *the equivalent of an acquittal.*" *Ibid.* (footnote omitted). Thus, the Court stated that "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected." *Id.* at 326. This disposes of the contention that the government may not prosecute a defendant under a superseding indictment returned after a hung jury.

*Richardson* did not, however, preclude the application of other double jeopardy doctrines to Campbell's circumstances. The fact that jeopardy has not terminated does not necessarily preclude the application of the "same agreement or conspiracy" framework developed in *United States v. Sinito*, 723 F.2d 1250 (6th Cir. 1983), or the "same offense" doctrine established in *Blockburger v. United States*, 284 U.S. 299 (1932), or collateral estoppel as stated in *Ashe v. Swenson*, 397 U.S. 436 (1970), to the situation in which a defendant has been acquitted on certain counts, and a hung jury has occurred on other counts. Indeed, neither *Sinito*, nor *Blockburger*, nor *Ashe* was mentioned in *Richardson*.

*b. Double Jeopardy Based on a Single Conspiracy?*

The key question for double jeopardy purposes is whether the conspiracy in Count 1 of the indictment, on which Campbell was acquitted, and the conspiracy in Count 16 of the indictment, on which the jury was hung, were the same or both part of a single agreement. If the conspiracy charged in Count 16 is the same, or part of the one charged in Count 1, Campbell's motion to dismiss must be granted. *In Re Grand Jury Proceedings*, 797 F.2d 1377, 1380 (6th Cir. 1986). In determining this issue, the district court applied the "totality of circumstances" test set out in *United States v. Sinito*, 723 F.2d 1250, 1256 (6th Cir. 1983) to the question of whether a single conspiracy or multiple conspiracies existed.

In *Sinito*, we adopted a "totality of circumstances" test for determining whether "separate conspiracies charged in different grand jury indictments are, in reality, one for the purposes of the fifth amendment prohibition against double jeopardy." 723 F.2d at 1253. That test consisted of five elements: (1) time; (2) persons acting as co-conspirators; (3) the statutory offenses charged in the indictments; (4) the overt acts charged by the government or any other description of the offenses charged which indicates the nature and scope of the activity which the government sought to punish in each case; and (5) places where the events alleged as part of the conspiracy took place. 723 F.2d at 1256. We stated that "[w]here several of these factors differ between the conspiracies, the conclusion follows that the alleged illegal conspiracies are separate and distinct offenses." 723 F.2d at 1256-57 (citation omitted).

In *Sinito*, the defendant contended that two counts of a seventy-count indictment duplicated a previous eighteen-count indictment on which he had been convicted. On April 10, 1981, defendant Sinito and his cousin,

Charles Sinito, were charged in an eighteen-count indictment with a RICO conspiracy, 18 U.S.C. § 1962(d), the completed substantive RICO offense, 18 U.S.C. § 1962(c), conspiracy to make extortionate extensions of credit, 18 U.S.C. § 892, the collection of extensions of credit by extortionate means, 18 U.S.C. § 894 and, as to defendant alone, income tax evasion, 26 U.S.C. § 7201, and filing of a false tax return, 26 U.S.C. § 7206. The indictment stated that the activity occurred between March 1, 1974 and January 30, 1979. The jury found defendant Sinito guilty of a RICO conspiracy and of several substantive RICO violations.

On October 27, 1982, Sinito, along with four other individuals, were charged in a new seventy-count indictment. Count one charged Sinito, along with other defendants, with a RICO conspiracy in violation of 18 U.S.C. § 1962(c). Count two charged Sinito and other defendants with engaging in a continuing criminal enterprise involving the distribution and possession of illegal narcotics, and deriving substantial income therefrom in violation of 21 U.S.C. § 848. Sinito argued that the second indictment should be dismissed because he had already been convicted a year earlier of a RICO conspiracy offense. Sinito essentially argued that there was but one conspiracy, so that prosecution under the second indictment violated the double jeopardy clause. 723 F.2d at 1254.

Applying the five-factor test, we held that there were two separate conspiracies. As to the first factor, we found that the time periods of March 1, 1974 through January 30, 1979, and March 1978 through October 28, 1982, were sufficiently different, despite some overlap, to suggest different conspiracies. As to the second factor, we held that each indictment involved a different set of participants, excepting defendant Sinito. As to the third factor, we found that although both indictments charged violations of the same statute, 18 U.S.C.

§§ 1962(c) and (d), the underlying statutory offenses were different. The first indictment was based on loansharking, whereas the second indictment was based on a pattern of racketeering: murder, drug trafficking and illegal gambling. As to the fourth factor, we found that the overt act of loansharking was not the same as the overt acts of murder, gambling, drug trafficking, and obstruction of justice. We also found that the geographical locations charged as Northern District of Ohio, Eastern Division and elsewhere were the same, but that this was a factor of "minimum significance." 723 F.2d at 1258-59.

We now apply the *Sinito* framework to Campbell's circumstances. The time period alleged in the indictment for Count 1 was the same as the time period alleged in the indictment for Count 16: January 1, 1985 continuing up to and including February 11, 1986. However, the superseding indictment charged that the conspiracy to violate 21 U.S.C. § 846 began on November 1, 1983 and continued up to and including March 12, 1986, which strongly suggests that the agreement for the commission of extortion was different from the agreement to violate federal drug distribution laws. The same persons were alleged to have acted as co-conspirators in Count 1 as in Count 16. However, the superseding indictment deleted defendant Steve Allen and already convicted Roger Benton. The statutory offenses are, in our view, more different than in *Sinito*, because they are based on different statutes, not simply on different underlying offenses. Count 1 charges a violation of the Hobbs Act, 18 U.S.C. § 1951, while Count 16 and the superseding indictment charge a violation of 21 U.S.C. § 846. Each statute requires a certain kind of agreement, but each is aimed at different evils. The overt acts charged in Count 1 are not comparable to anything in either Count 16, or the sole count of the superseding indictment, as a conspiracy to violate 21 U.S.C. § 846 does not require any

overt acts. *United States v. Brock*, 782 F.2d 1442 (7th Cir. 1986). Record testimony indicated that the defendants discussed extortion and drug distribution in both Morgan County, Kentucky and Florida.

Campbell quotes the testimony of McNeal and Allen, and the government's summation, as proof that the government was proceeding under a single agreement or conspiracy theory. The trial judge's charge to the jury, however, suggests that there were separate agreements or conspiracies. The trial judge stated that the position of the government was that Allen, Benton, Campbell, and Frederick "set up a plan to transport cocaine and marijuana to Morgan County from Florida . . . ." In our view, this suggests an agreement to transport illegal drugs violative of 21 U.S.C. § 846. The judge also stated that "payoffs or bribes would be made to Judge Allen, Sheriff Benton, and Captain Campbell, all local state officials." In our view, this suggests a separate agreement to take payoffs or bribes violative of the Hobbs Act, 18 U.S.C. § 1951. The trial judge stated that "[i]t is further the position of the United States that Titus Frederick and Gene Allen testified that both Campbell and Benton agreed to have controlled substances brought into Morgan County and they would profit thereby." The trial judge thus understood, in charging the jury, that the agreement to commit extortion was separate from the agreement to distribute drugs.

Notwithstanding Campbell's arguments, the district court correctly recognized that *United States v. Jabara*, 644 F.2d 574, 576-77 (6th Cir. 1981) requires that the government show by a preponderance of the evidence that separate conspiracies existed. The district court found that "there was extensive testimony by several who said that they discussed with the defendant Campbell the fact that they were going to set up an operation for the distribution of cocaine and marijuana around the Morgan County area." We have previously indicated that "[t]he

finding of fact by the lower court that the government had proven by a preponderance of the evidence that multiple conspiracies existed can be set aside only if it is clearly erroneous." *In Re Grand Jury Proceedings*, 797 F.2d at 1380-81. We find that the district court's factual conclusion is not clearly erroneous.

*c. Double Jeopardy Based on "Same Offense"*

As his main argument, Campbell contends that the double jeopardy clause's protection against a second prosecution for the same offense after acquittal prevents his retrial on Count 16 or on the superseding indictment, both of which charge an attempt or conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. Essentially, Campbell argues that a § 846 conspiracy offense is the "same offense" for double jeopardy purposes as the Hobbs Act conspiracy offense of which Campbell was acquitted. The record shows that at no time did Campbell move for a dismissal of either count 1 or count 16 on the ground that they were duplicative. Campbell maintains that whether certain conduct constitutes the "same offense" for purposes of double jeopardy analysis depends on whether Congress intended that each statutory violation be a separate offense, relying on *Garrett v. United States*, 471 U.S. 773 (1985). Campbell argues that determination of congressional intent involves a three-step process of (1) reviewing the plain language of the statutes; (2) reviewing the legislative history of the statutes; and (3) applying the judicial rule of statutory construction set out in *Blockburger v. United States*, 284 U.S. 299 (1932).

After concluding that the plain language of the two statutes, and their respective legislative histories shed no light on the same offense analysis, Campbell turns to the final step of the process: statutory construction. He argues that the Supreme Court cases of *Whalen v. United States*, 445 U.S. 684 (1980) and *Illinois v. Vitale*,

447 U.S. 410 (1980) have "modified the test originally set out in *Blockburger*." According to Campbell, the *Blockburger* test "had traditionally focused on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial." Campbell argues that "*Whalen* and *Vitale* make clear, however, that in applying *Blockburger* the requisite statutory elements must be examined from the vantage point of the particular case before the court." Campbell stated that "[b]efore applying the *Blockburger* test they must narrow the applicable statutes to be analyzed until they include only the alternatives relevant to the case at hand."

Applying this fact-specific analysis, Campbell concludes that a conspiracy to violate 21 U.S.C. § 846 is a lesser included offense of a conspiracy to violate 18 U.S.C. § 1951. We fundamentally disagree that the Supreme Court has necessarily changed the focus of *Blockburger* analysis from the statutory elements of the offenses argued to be the "same," to the particular facts alleged in the indictment,[3] or proffered as proof at trial, and thus we fully reject Campbell's fact-specific analysis.

Conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951, requires the following elements:

(1) an agreement between two or more individuals,

(2) affecting interstate commerce,

(3) to obtain property from another,

(4) with consent,

(5) induced under color of official right.

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[3] The *Whalen* Court made clear that, despite the dissenting view of then Justice Rehnquist at 445 U.S. 684, 699-714, it did ". . . not in this case apply the *Blockburger* rule to the facts alleged in a particular indictment." 445 U.S. at 694 n.8.

Conspiracy to violate 21 U.S.C. § 846 by drug distribution requires the following elements:

(1) an agreement between two or more individuals to distribute

(2) illegal drugs such as cocaine, with

(3) intent to distribute.

The Supreme Court enunciated a test for determining whether two offenses are the same for double jeopardy purposes in *Blockburger v. United States*, 284 U.S. 299 (1932). There, the Court stated that:

> where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . . (citations omitted) A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. (citations omitted)

*Id.* at 304.

In *Illinois v. Vitale*, 447 U.S. 410, 416 (1980), the Supreme Court indicated that the *Blockburger* test "focuses on the proof necessary to prove the statutory elements of each offense, *rather* than on the actual evidence to be presented at trial." (emphasis supplied) The *Vitale* Court found this conclusion to be consistent with *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) wherein the Court stated that "[i]f each [offense] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." 447 U.S. at 416 n.6. In *United States v. Zackert*, 783 F.2d

677, 679 (6th Cir. 1986) (per curiam) we held, consistent with Supreme Court precedent, that "the question is not whether one might be, or is, convicted on the same facts in a particular case; rather, the court looks to whether every violation of one statute entails a violation of another."

In our view, every violation of 18 U.S.C. § 1951 does not entail a violation of 21 U.S.C. § 846. Conspiracy to violate 18 U.S.C. § 1951 requires proof of an agreement to commit extortion under color of official right, and it also requires a showing of an effect on interstate commerce, neither of which is required for a conspiracy to violate 21 U.S.C. § 846. Drug conspiracy under 21 U.S.C. § 846 requires proof of an agreement to commit a federal drug offense, which is not a necessary element of a § 1951 conspiracy. Each offense requires proof of a different agreement, and the two statutes are aimed at different evils, extortion and drug distribution. Furthermore, as indicated above, conspiracy to violate 21 U.S.C. § 846 does not require proof of an overt act, while conspiracy to violate 18 U.S.C. § 1951 does require proof of an overt act.

Moreover, Campbell has failed to offer any evidence that Congress did not intend to allow separate punishment for the two different offenses. *United States v. Woodward*, 469 U.S. 105 (1985). Under *Albernaz v. United States*, 450 U.S. 333, 340 (1981), legislative intent must in this respect be "clear."

Furthermore, in *United States v. Cylkouski*, 556 F.2d 799 (6th Cir. 1977), the defendant was charged with two separate conspiracies, although the proof at trial overlapped. Following *Blockburger*, we held that although the evidence of the violations was substantially the same, there were two distinct and separate conspiracies. *Id.* at 801.

*d. Collateral Estoppel*

Campbell argues that even if the two offenses are sufficiently different under *Blockburger* to permit prosecution for both, such successive prosecutions will still be barred in some instances where the second prosecution requires the relitigation of ultimate factual issues already resolved by the first. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). It is clear that the burden is on Campbell to prove by convincing and competent evidence that the fact sought to be foreclosed was necessarily determined by the jury against the government in the prior trial. *United States v. Gentile*, 816 F.2d 1157, 1162 (7th Cir. 1987).

The district court found that "it is obvious that the jury could have found that the Defendant Campbell did not receive nor solicit any money, but nevertheless could have conspired to possess with intent to distribute or to distribute marijuana and cocaine." The district court further noted that there was "extensive testimony" by several witnesses who discussed such distribution with Campbell. We agree with the district court.

Under the leading case of *Ashe v. Swenson*, 397 U.S. 436 (1970), the Supreme Court held that collateral estoppel is a part of the constitutional guarantee against double jeopardy. When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated by the same parties in any subsequent action. *Id.* at 443. If such issues of fact must be proven in the second trial in order to convict, then the entire prosecution is prohibited.

In *Ashe*, a defendant had been acquitted, on the basis of conflicting testimony, of robbing a poker game participant. The state sought to retry him before a new jury on whether he had robbed a different poker game participant but in the same place and at the same time. The Court held that the state could not constitutionally

"present the same or different identificaton evidence in a second prosecution for the robbery of Knight in the hope that a different jury might find that evidence more convincing." 397 U.S. at 446.

Campbell's case is distinguishable from *Ashe* insofar as the jury, in acquitting Campbell on the Hobbs Act conspiracy charges, had not necessarily determined that he was not a member of any conspiracy to distribute drugs under 21 U.S.C. § 846, in the same sense as the *Ashe* Court found that the petitioner was not one of the robbers. At most, all that can be said about the jury's acquittal of Campbell on the Hobbs Act conspiracy charges, based on testimony in the record, is that the jury determined that Campbell had not agreed to commit extortion. Indeed, it is very difficult to determine the basis for an acquittal. An acquittal need not be based on any jury factual finding, as acquittals based on jury lenity can attest. Unless it can be said with definite assurance, and by clear evidence, that the jury found a fact in the defendant's favor, which is also a necessary element of the crime sought to be reprosecuted, *Ashe* will not assist a criminal defendant.

Essentially Campbell argues that since the jury determined that he was not a member of the conspiracy to extort under the Hobbs Act, 18 U.S.C. § 1951, he could not be retried for being a member of a conspiracy to distribute drugs in violation of 21 U.S.C. § 846. In making this argument, Campbell argues that there was only one agreement. We have already determined, however, that a jury could find that there was more than one conspiracy.

Even assuming that only one discussion among the criminal defendants occurred, the jury could have merely found, in our view, that Campbell had simply not agreed to commit extortion in violation of the Hobbs Act, 18 U.S.C. § 1951. Such a finding does not in any way fore-

close the possibility that Campbell may have agreed to distribute drugs in violation of 21 U.S.C. § 846.

Therefore, we affirm the district court's decision to permit Campbell's retrial on the superseding indictment.

B. BENTON

Benton maintains that the district court erred in permitting Gene Allen, then County Judge of Morgan County, to testify to certain "prior bad acts and crimes of Benton" which concerned bootlegging. Allen testified on behalf of the government that Benton and Allen had met in 1982, 1983 and 1984 for the purpose of forming a scheme to take payoffs and protection money from bootleggers in Morgan County in exchange for allowing the bootleggers to operate free from arrest and prosecution. Allen testified that he and Benton had received kickback money in the years 1982, 1983, and 1984. Benton maintains that there was no other corroborating evidence of these prior bad acts offered by the government.

At trial, Benton had defended himself on the theory that he was conducting an investigation of drug dealing in Morgan County. Under this theory, it was only natural that he would have been involved in accepting amounts of money and drugs from those persons he was investigating. What appeared to be criminal activity under federal law, he contends, was in reality part of an ongoing criminal investigation.

In defending himself in this way, Benton put in issue his intent or motive in accepting the money and drugs. Indeed, the government recognized this in specifically requesting the court's permission to introduce evidence tending to rebut Benton's defense theory, and the purported intent or motive implicit therein. The court agreed with the government that Benton's defense theory put in issue his intent and motive in accepting the money and drugs, and further agreed with the government that

evidence of Benton's previous acceptance of payoffs and protection money from bootleggers would shed light on Benton's intent and motives in the case at bar. The court thus permitted Allen to testify about Benton's involvement in the bootlegging industry.

Under Fed. R. Evid. 404(b),[4] Benton concedes that evidence of other crimes, wrongs, or acts may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Under the balancing of probativeness with prejudice required by Fed. R. Evid. 403,[5] Benton argues that the evidence was so prejudical that it was an abuse of discretion for the district court to admit such evidence. Benton concedes that we must reveiw the district court's decision to admit the above evidence under an "abuse of discretion" standard. *United States v. Huddleston*, 811 F.2d 974, 975 (6th Cir. 1978); *United States v. Pollard*, 778 F.2d 1177, 1179 (6th Cir. 1985).

In our view, it was well within the district court's discretion to admit such evidence. The district court could have reasoned that these previous instances of extortion relating to protection of bootlegging were relevant and important to prove motive, opportunity, intent, preparation or even plan concerning the charges of extortion

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[4] Fed. R. Evid. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[5] Fed. R. Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

relating to protection of cocaine dealers in the indictment, and outweighed any possible prejudice to Benton. Moreover, where evidence of prior bad acts is admitted for the purpose of showing intent, the prior acts need not duplicate exactly the instant charge, but need only be sufficiently analogous to support an inference of criminal intent. *United States v. Burkett*, 821 F.2d 1306, 1309 (8th Cir. 1987) We find that evidence of prior acceptance of bribes and payoffs relating to bootlegging is sufficiently similar to acceptance of protection money for drug dealing to support an inference of criminal intent. *United States v. Faulkner*, 538 F.2d 724 (6th Cir.), *cert. denied*, 429 U.S. 1023 (1976). Other circuits have also held that evidence of prior bribes or payoffs is admissible to prove criminal intent relating to charges of extortion under color of official right under the Hobbs Act. *E.g.*, see *United States v. Price*, 617 F.2d 455, 459-60 (7th Cir. 1980).

As his second argument, Benton maintains the district court erred in permitting Campbell to enter into evidence some papers called a "Confidential File" purportedly maintained by Campbell. Benton argues that the Confidential File was inadmissible hearsay and opinion evidence; that it was not admissible for any purpose under Fed. R. Evid. 404(b); and that it amounted to impermissible bad reputation evidence. Benton argues that the Confidential File material contained unsupported allegations tying him to other crime figures in Morgan County.

Campbell, not the government, introduced the Confidential File into evidence. Campbell offered it to show that he was using Allen and Frederick to acquire information for an investigation into drug dealing in Morgan County.

In our view, this evidence was not as prejudicial to Benton as he leads us to believe. The file only referred to Benton as a possible "target" in a police investigation.

The government points out in its brief that Benton's counsel on cross-examination of Campbell elicited the fact that the target report was made by a trooper who bore a personal prejudice towards Benton. Indeed, the only question the government asked concerning the Confidential File was when it was turned over to the government. Neither the government, nor either defense attorney, referred to Benton's name being in the Confidential File in their closing arguments to the jury. Thus, the lack of emphasis at trial strongly suggests that the jury was unaffected by this piece of evidence, and therefore Benton was not unduly prejudiced by its admission into evidence.

The court was conscious of the limited purposes for which the Confidential File evidence was introduced, and warned the jury not to use the reports in that file against Benton for any reason. The court indicated that the file was admitted "to show, number one, that Captain Campbell says that he was conducting an investigation; and second, is to show whether or not he and Mr. Benton were close enough to be engaged in a conspiracy or to disprove the fact that there was a conspiracy . . . But it's not to be used against Mr. Benton at all." In our view, under Fed. R. Evid. 801(c) the district court was well within its discretion to admit this evidence, since it was admitted not for its truth, but rather to illuminate Campbell's contention that he was conducting his own investigation, and that he maintained a file on the investigation. *United States v. Gibson*, 675 F.2d 825, 833-34 (6th Cir. 1982).

Benton also maintains that the district court should have severed the two trials, claiming that he was affected by a "general atmosphere of criminality prejudicial to Benton." However, he shows no specific evidence tending to create such a general atmosphere. The record shows that the Motion to Grant Separate Trial for Defendant Roger Benton stated only that "the trial of this

defendant with the other defendants herein will be to the prejudice of the defendant, Roger Benton, and may cause him to receive an unfair trial." The motion contained no other grounds for severing the two trials, and failed to request a hearing. Thus, the court was completely justified in denying Benton's motion without a hearing. *United States v. Williams*, 809 F.2d 1072, 1084 (5th Cir. 1987).

At the close of the government's proof, Benton renewed his motion for severance on the ground that antagonistic defenses had been made by Campbell and Benton. In *United States v. Gallo*, 763 F.2d 1504 (6th Cir. 1985), *cert. denied*, 474 U.S. 1068 (1986), we held that different defenses by co-defendants do not require a severance of their trials. We held that to prevail the defendant must show that the antagonism between the co-defendants will mislead or confuse the jury. *Id.* at 1525. We recently held that the defendant carries the heavy burden of making a strong showing of factually specific and compelling prejudice resulting from a joint trial. *United States v. Davis*, 809 F.2d 1194, 1207-08 (6th Cir. 1987); *United States v. Swift*, 809 F.2d 320, 322 (6th Cir. 1987). In meeting this heavy burden, the defendant must demonstrate the jury's inability to distinguish the evidence relevant to each defendant. 809 F.2d at 322. We further indicated that even if the defendant is able to show some potential jury confusion, such confusion must be balanced against society's interest in speedy and efficient trials. Because Benton has altogether failed, in either oral argument or in the written brief to this court, to indicate in what way the jury was confused, we hold that the court committed no error in proceeding with a joint trial of Campbell and Benton.

Finally, Benton maintains that the district court erred by permitting the government to present character witnesses to testify about Benton's reputation for honesty. As part of his defense, however, Benton introduced char-

acter testimony from three witnesses. For example, witness J. W. Pennington testified that Benton had a reputation for "being an honest individual."

To rebut this character evidence, the government called three witnesses. Each witness essentially testified that Benton's reputation for truth and veracity was dubious. Once Benton opened the door by offering evidence of his good character, the government had the right to rebut that evidence. *United States v. McGuire*, 744 F.2d 1197, 1204 (6th Cir.), *cert. denied*, 471 U.S. 1004 (1984). In our view, one of the key issues in Benton's trial was his honesty. He had defended the various charges of extortion and conspiracy to distribute drugs on the ground that he was conducting an honest investigation of drug dealing in Morgan County. The district court was well within its discretion to admit evidence tending to show that Benton did not have a reputation for being an honest law enforcement official.

Therefore, Benton's convictions on all counts are AFFIRMED.

## APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

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Criminal Number 86-7 and 86-7-S

UNITED STATES OF AMERICA,
*Plaintiff,*

vs.

MARION DOUGLAS CAMPBELL,
*Defendant.*

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[Filed Mar. 20, 1987]

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## MEMORANDUM

This matter has come before the Court on the motion by the Defendant Campbell to dismiss on the grounds that the double jeopardy clause of the Fifth Amendment to the United States Constitution and the doctrine of collateral estoppel preclude a second prosecution of the defendant under either Count 16 of Indictment Number 86-7 or under the only count in Indictment Number 86-7-S. The parties have agreed that the same legal issue is presented on both indictments, and the Court may consider the evidence introduced at the trial in Criminal Number 86-7, which resulted in an acquittal for the Defendant Campbell on all counts save Count 16.

The key issue in this case is whether an acquittal on the conspiracy charged in Count 1, in Indictment 86-7,

precludes the retrial of the Defendant on Count 16 of that Indictment or the only count in Indictment 86-7-S.

Count 1 of the original indictment charged the Defendant Campbell, along with several others, of conspiring to obstruct, delay and affect commerce by extortion, that is, by obtaining and attempting to obtain money and cocaine from Huston E. McNeal, with his consent, under color of official right, in violation of 18 U.S.C. § 1951. Count 16, or the only count in Indictment Number 86-7-S, charges this Defendant, along with others, of violating 21 U.S.C. § 846 by attempting and conspiring to distribute and possess with intent to distribute cocaine and marijuana.

If the conspiracy remaining in this charge and the conspiracy for which the Defendant was acquitted in Count 1 were both part of a single agreement, the motion to dismiss must be granted. *See Braverman v. United States*, 317 U.S. 49 (1942); *In Re Grand Jury Proceedings*, 797 F.2d 1377 (6th Cir. 1986). The Defendant must show that a single conspiracy exists, but meets that burden if he advances a non-frivolous showing of a single conspiracy. *Id*; *United States v. Jabara*, 644 F.2d 574, 576-77 (6th Cir. 1981). Then, the United States must show separate conspiracies by a preponderance of the evidence. *Id.* In determining whether there is a single conspiracy or multiple conspiracies, the Court will apply a "totality of the circumstances" test outlined in *United States v. Sinito*, 723 F.2d 1250, 1256 (6th Cir. 1983).

As stated *In Re Grand Jury Proceedings*, *supra* at 1385, once the Defendant has put forth a non-frivolous claim of double jeopardy, the Court is supposed to hold an evidentiary hearing to resolve any factual disputes that arise. However, that is unnecessary in this case, as the parties have agreed that the evidence which was introduced at the trial involving both Counts 1 and 16,

is the same which would be introduced at the evidentiary hearing.

If this Court applied the "same evidence" test, *see In Re Grand Jury Proceedings*, *supra* at 1380, it could be seen that the same evidence is not required to prove both offenses involved here. Count 1 of the original indictment required proof of a conspiracy to obstruct, delay or affect commerce by extortion under color of official right. Admittedly, the word "cocaine" was used in both indictments, but Count 16 of the original indictment charged the Defendant and others with attempting and conspiring to distribute and possess with intent to distribute cocaine and marijuana. The only common denominator between the two is "cocaine."

However, this Court will follow the "totality of the circumstances" test from *Sinito*. It is obvious that the first factor, time, is the same in the original Indictment, although the superseding indictment extended the time period. Second, the same persons acted as co-conspirators in Counts 1 and 16 of the original indictment, although the superseding indictment reduces the conspirators to the Defendants Campbell, Gene Allen and Titus Frederick and others known and unknown to the Grand Jury. The third factor, the statutory offenses, are entirely separate, as stated, *supra*. The fourth factor, the overt acts charged in Count 1, are not comparable, as no overt acts are charged in Count 16 or in the superseding indictment. With regard to the fifth factor, where the events took place, they all occurred in the Eastern District of Kentucky and elsewhere. From the evidence in the case, the conspiracy for both counts took place in approximately the same area, that is, in Morgan County in the Eastern District of Kentucky and in Florida.

Even though a lot of these factors are the same, this Court finds proof of separate conspiracies, as the proof required for the two violations are entirely different. At

trial, the Defendant Campbell denied that he attempted to obtain any money from Huston E. McNeal. The only witness who said that Campbell received money was the co-defendant, Gene Allen. Thus, the jury apparently disbelieved Gene Allen. On the other hand, there was extensive testimony by several who said that they discussed with the Defendant Campbell the fact that they were going to set up an operation for the distribution of cocaine and marijuana around the Morgan County area. That would not require the obtaining of money by extortion and would not require that the Defendant was acting under some color of official right.

It is obvious here that every violation of 18 U.S.C. § 1951 does not constitute a violation of 21 U.S.C. § 846. When that occurs, the defendant must offer evidence that Congress did not intend to allow separate punishment for the two different offenses. *United States v. Zackert*, 783 F.2d 677, 679 (6th Cir. 1986); *see United States v. Woodward*, 469 U.S. 105 (1985). When that is raised, this indication of legislative intent must be "clear." *Albernaz v. United States*, 450 U.S. 333, 340 (1981).

As in the case of *United States v. Cylkowski*, 556 F.2d 799 (6th Cir. 1977), this Defendant was charged with two separate conspiracies, although the proof overlapped. Following *Blockburger v. United States*, 284 U.S. 299 (1932), the Court found that although the evidence for the trial of both charges was substantially the same, nevertheless these were two separate conspiracies. In the case *sub judice*, as in *Cylkowski*, there is no evidence that Congress did not intend for there to be separate punishments for conspiracies under these very diverse offenses. Thus, the intent of Congress was to allow separate prosecutions under the circumstances of this case.

The issue of collateral estoppel under *Ashe v. Swenson*, 397 U.S. 436 (1970), has no merit here. As stated previously, it is obvious that the jury could have found that the Defendant Campbell did not receive nor solicit any

money, but nevertheless could have conspired to possess with intent to distribute or to distribute marijuana and cocaine. It may be that at a trial under the superseding indictment, certain parts of the evidence introduced at the first trial would be inadmissible, but that issue is not currently before the Court.

With further regard to the claim by the United States that the Defendant's claim is frivolous, this Court disagrees and finds that it is not frivolous, but the United States has shown separate conspiracies by a preponderance of the evidence under the test in *In Re Grand Jury Proceedings, supra.* Nevertheless, this Court is not now making a ruling on whether the denial of the motion will be immediately appealable under *Abney* v. *United States,* 431 U.S. 651 (1977), as that issue is not yet before the Court.

For the reasons set out herein, the Motion to Dismiss will be denied.

This *20* day of *March,* 1987.

/s/ Eugene E. Siler, Jr.
EUGENE E. SILER, JR.
Chief Judge

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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87-5361

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

vs.

MARION D. CAMPBELL,
*Defendant-Appellant.*

---

[Filed May 1, 1987]

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ORDER

Before: LIVELY, Chief Judge; ENGEL and KRUPANSKY, Circuit Judges.

The defendant appeals an order denying his motion to dismiss in this criminal action. The government now moves to dismiss the appeal on grounds that there has been no final decision for purposes of 28 U.S.C. 1291. The defendant has filed a response in opposition to the motion.

A jury trial resulted in the defendant's acquittal on charges of conspiracy to extort protection money under color of official right from purported drug dealers and conspiracy to affect commerce by accepting payoffs from purported drug dealers. However, the jury was unable to bring a verdict on one count of attempting and conspiring to distribute drugs, and a mistrial was declared as to that count. The defendant then moved for dismissal

on grounds that because there was only one agreement and one conspiracy objective, and because the same evidence was used to prove each offense, the remaining charge was barred by the Double Jeopardy Clause. U.S. Const., amend. V. The district court denied the motion, and the defendant filed a timely notice of appeal.

*Abney v. United States*, 431 U.S. 651 (1977) provides that denial of a motion to dismiss an indictment on colorable double jeopardy grounds may be appealed under the collateral order exception to the final judgment rule first announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). However, a recent case interpreting *Abney*, *Richardson v. United States*, 463 U.S. 317 (1984), held that denial of a motion to dismiss on grounds that in a previous trial the government failed to introduce sufficient evidence to establish guilt is not a colorable claim of double jeopardy and thus is not immediately appealable. In *Richardson* the defendant argued that because of the mistrial, double jeopardy barred a retrial of the two counts involved. The present defendant aserts that acquittal on the earlier counts bars retrial on the distribution count.

Because the defendant asserts a colorable claim of double jeopardy, this Court has jurisdiction over the appeal. Accordingly,

It is ORDERED that the motion to dismiss is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

(9)

Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-479

# In the Supreme Court of the United States

OCTOBER TERM, 1988

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MARION D. CAMPBELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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1988

## QUESTIONS PRESENTED

1. Whether the district court and the court of appeals erred in finding that two conspiracy charges in a single indictment constituted separate offenses for purposes of the Double Jeopardy Clause.

2. Whether collateral estoppel bars the government from reprosecuting petitioner for conspiracy to distribute drugs, on which a jury was unable to reach a verdict, after the same jury acquitted petitioner of conspiracy to commit extortion.

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-479

MARION D. CAMPBELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 852 F.2d 1456. The opinion of the district court (Pet. App. 26a-30a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 22, 1988. The petition for a writ of certiorari was filed on September 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

### STATEMENT

In 1986 a federal grand jury in the Eastern District of Kentucky charged petitioner with conspiracy to commit extortion under color of official right and three substantive extortion counts, in violation of the Hobbs Act, 18 U.S.C. 1951. The grand jury also charged that petitioner

conspired to distribute cocaine and marijuana and to possess those substances with intent to distribute them, in violation of 21 U.S.C. 846. After a jury trial, petitioner was acquitted of the three substantive extortion counts and of the count charging him with conspiracy to commit extortion. The jury was unable to reach a verdict on the count charging petitioner with conspiracy to distribute cocaine and marijuana, and a mistrial was declared as to that count.

This case arises from petitioner's motion to dismiss the remaining count on double jeopardy grounds. The district court denied the motion to dismiss (Pet. App. 26a-30a), and on petitioner's interlocutory appeal the court of appeals affirmed and remanded the case for trial (Pet. App. 1a-25a).

1. During the period relevant to the charged offenses, petitioner was a high-ranking officer of the Kentucky State Police. Co-defendant Roger Benton was the Sheriff of Morgan County, Kentucky. Co-defendant Gene Allen was the Morgan County Judge.

Count 1 of the original 18-count indictment charged petitioner, Benton, Allen, and two others with conspiracy to commit extortion between January 1, 1985, and February 11, 1986. In particular, Count 1 alleged that the five defendants obtained and attempted to obtain money and cocaine under color of official right from an undercover FBI agent posing as a cocaine distributor. Under the scheme alleged in Count 1, the defendants agreed to obtain money and cocaine from the agent in return for extending police protection to the agent's drug operation. The conspirators agreed to inform the undercover agent about any state or local investigation that might affect his cocaine distribution and to permit the agent to fly loads of cocaine into the county and to distribute the contraband there.

Count 16 of the original indictment charged the same five individuals with a conspiracy to possess and distribute cocaine and marijuana within the same time period as Count 1, in violation of 21 U.S.C. 846.

Three of the charged conspirators, including Judge Allen, pleaded guilty and testified for the government at the trial of petitioner and co-defendant Roger Benton. Their testimony and the other evidence at trial, which are outlined in the opinion below (Pet. App. 4a-7a) and set out in the government's brief in the court of appeals (at 3-16), showed that in late 1983 petitioner approached Judge Allen to discuss how they could profit from the highly lucrative drug dealing in which others were engaged. As Allen explained, "everytime I was with [petitioner] we discussed the drug business" (VI Tr. 24; Pet. App. 4a-5a). The two initially planned to obtain drugs from a corrupt Florida sheriff and fly them into Morgan County, Kentucky. In the fall of 1984, petitioner and Allen met with co-defendant Titus Frederick, whom they believed to have connections in the drug business, in an effort to locate a supplier of drugs for their planned distribution. The three men also met frequently with a local attorney to discuss their hopes of making money in the drug business, and they tried unsuccessfully to obtain financial backing for the venture from the attorney. *Ibid.*

The conspirators then turned to Houston E. McNeal, an FBI undercover agent who was posing as a drug dealer. McNeal agreed to pay the five conspirators $5000 a month for protection and to avoid arrest. He paid $2500 initially to one of the co-defendants, who said he would give the money to petitioner. Subsequently, McNeal brought two kilograms of cocaine into Morgan County, and he then sold the cocaine at Allen's home to purported buyers who in fact were other FBI agents. After the sale, McNeal gave

$2500 to Allen and another conspirator and left an additional $2500 for petitioner. Less than two months later, McNeal paid Allen another $5000 and gave him an additional $5000 to be paid to petitioner. One week after those payments McNeal gave $5000 to Benton for protection. Pet. App. 5a-6a.

In his defense, petitioner testified that he engaged in the conduct proved at trial not as part of an illegal scheme, but because he was conducting his own investigation of McNeal. Sheriff Benton also presented that defense. Pet. App. 6a. Co-defendant Steve Allen (the son of Judge Allen), however, testified that after their arrests his father and Sheriff Benton said that "they were going to say they were conducting an investigation on their own" and would see if petitioner would go along with that plan (V Tr. 95). In addition, other police officers and the county prosecutor explained that neither man had informed them of their alleged investigation (Pet. App. 6a-7a). Moreover, a state police officer stated that petitioner had asked him to testify that the two had discussed the investigation; when the officer replied that he could not "get on the stand and commit perjury," petitioner responded, "Big * * * deal, I am looking at ninety-five years." IX Tr. 44.

The jury convicted Benton of both conspiracies and all substantive extortion counts. At the same time, it acquitted petitioner of the extortion conspiracy charge (Count 1) and the three substantive extortion counts. The jury was unable to reach a verdict as to petitioner on the drug distribution conspiracy charged in Count 16.

2. After the government moved to set a date for a retrial on the remaining conspiracy charge, petitioner moved to dismiss that count on double jeopardy grounds. While the motion was pending the government obtained a superseding indictment that amended the time frame of the original charged drug conspiracy and deleted reference

to the planned distribution of marijuana. Whereas Count 16 had originally alleged a conspiracy existing from January 1, 1985, through February 11, 1986, the superseding indictment dated the conspiracy from November 1, 1983, through March 12, 1986. The new count also deleted reference to Benton (who had been convicted on Count 16) and to defendant Steve Allen, the son of Judge Allen.

The district court denied the motion (Pet. App. 26a-30a). The court found that the two offenses charged in Count 1 and Count 16 constituted separate conspiracies and that charging petitioner with the two conspiracy offenses therefore did not violate the Double Jeopardy Clause. The court pointed out that the two conspiracy offenses with which petitioner was charged have very different elements and that there is no evidence that Congress did not intend to permit separate punishment for violations of the two conspiracy statutes. In addition, the court noted that the evidence supporting the two conspiracy charges was quite different. There was extensive, corroborated testimony, the court pointed out, that petitioner had discussed and planned a drug distribution operation in the Morgan County area. By contrast, the only testimony that petitioner indirectly received money from Agent McNeal was the testimony of a charged co-conspirator, who stated that he passed McNeal's money to petitioner. Pet. App. 28a-29a.

The district court then rejected petitioner's collateral estoppel claim. Based on the evidence at trial, the court stated that "it is obvious that the jury could have found that the Defendant Campbell did not receive nor solicit any money, but nevertheless could have conspired to possess with intent to distribute or to distribute marijuana and cocaine." Pet. App. 29a-30a.

3. The court of appeals affirmed (Pet. App. 1a-25a). It agreed with the district court that the indictment charged two separate conspiracies (Pet. App. 12a-14a). The court of appeals also rejected petitioner's claim that his acquittal on the Hobbs Act conspiracy charge collaterally estopped the government from reprosecuting him on the drug conspiracy charge (Pet. App. 18a). The court determined that the jury's acquittal on the extortion conspiracy count could well have been based on the conclusion that petitioner did not agree to commit extortion. Given the alternative explanations for the jury's verdict on the extortion conspiracy count, the court of appeals held that it could not find "with definite assurance, and by clear evidence, that the jury found a fact in [petitioner's] favor, which is also a necessary element of" the pending drug conspiracy charge (Pet. App. 19a). In the absence of such a finding, the court concluded, collateral estoppel does not bar petitioner's retrial.

## ARGUMENT

1. Petitioner first contends (Pet. 7-18) that the two conspiracies alleged in the indictment constitute the "same offense" for purposes of the Double Jeopardy Clause and that he cannot be prosecuted on the drug distribution conspiracy charge after having been acquitted on the extortion conspiracy charge.

a. Even if petitioner were right in his contention that the two conspiracies charged in this case arose from a single agreement, there would be no double jeopardy bar to the prosecution of that agreement as two separate crimes. In *Albernaz* v. *United States*, 450 U.S. 333 (1981), this Court held that a single agreement to import marijuana and then distribute it domestically could be prosecuted and punished as two separate crimes: conspiracy to import marijuana, in violation of 21 U.S.C. 963; and

conspiracy to distribute marijuana, in violation of 21 U.S.C. 846. The Court made clear (450 U.S. at 338-342, 344 n.3) that separate conspiracy statutes can support separate charges in a case such as this one. Thus, when the different conspiracy statutes proscribe agreements with different unlawful ends, and each statute requires proof of a fact that the other does not, the Double Jeopardy Clause permits prosecution and punishment under both statutes unless Congress affirmatively indicates that it does not intend cumulative punishment under the two statutes. Here, the two statutes proscribing the charged conspiracies each require proof of a fact that the other does not,[1] and petitioner has pointed to nothing in the statutory language or legislative history to negate the presumption that Congress intended to allow a single agreement to be prosecuted under both statutes. Petitioner's contention is therefore wrong because, by analogy to *Albernaz,* a single agreement to extort and to distribute drugs can be prosecuted under both 18 U.S.C. 1951 and 21 U.S.C. 846 without violating the Double Jeopardy Clause. See also *United States* v. *Woodward,* 469 U.S. 105, 107-109 (1985); *American Tobacco Co.* v. *United States,* 328 U.S. 781, 787-789 (1946).

Petitioner apparently seeks to avoid the effect of the rule in *Albernaz* by characterizing this as a case involving multiple prosecutions, whereas *Albernaz* involved multiple charges in a single indictment. That suggestion fails for two reasons. First, because each of the conspiracy statutes contains at least one element not contained in the other, the two conspiracy charges satisfy the requirements of *Blockburger* v. *United States,* 284 U.S. 299 (1932), and could therefore be separately charged in separate indict-

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[1] Petitioner concedes as much (Pet. 13).

ments resulting in separate trials. See *Garrett* v. *United States*, 471 U.S. 773, 778-779 (1985). Second, this is not a case involving "successive prosecutions," but rather a case involving a single prosecution that has resulted in two trials because of a mistrial granted on the drug conspiracy count. Petitioner has therefore been placed in jeopardy only once (see *Richardson* v. *United States*, 468 U.S. 317, 325 (1984)); the retrial on the drug conspiracy charge is part of the single proceeding against petitioner. This case is thus analogous to *Ohio* v. *Johnson*, 467 U.S. 493 (1984), which this Court held to involve only a single proceeding for double jeopardy purposes, even though the State sought to try the defendant on certain counts of an indictment after he had been convicted on others (see 467 U.S. at 500-502). As the Court explained in *Johnson*, "the principles of finality and prevention of prosecutorial overreaching" (*id.* at 501) do not apply when the defendant is subject to continuing prosecution "on the remaining charges brought in the indictment" (*ibid.*). The mistrial declared after a hung jury on the drug conspiracy count entitles the government to a new trial at which it will have "one complete opportunity to convict those who have violated its laws." *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978).

Petitioner's position is wrong for the further reason that the evidence in this case established two separate agreements. The evidence showed that petitioner and Allen initially conspired between themselves and with others to make money distributing drugs well before the possibility of extorting money or drugs from McNeal arose. After their efforts to obtain drugs from a Florida source and financing from a local attorney failed, some or all of the various conspirators then entered into a separate agreement to extort McNeal as a potential source of either cocaine or money with which to buy a supply of drugs for

distribution.[2] In light of the facts proved at trial, the two charged conspiracies involve substantially different activities and thus could properly be inferred to be the product of separate agreements even if the two conspiracy counts were not based on different statutory provisions.[3]

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[2] Although the government charged and sought to prove that all of the individuals involved in the drug conspiracy, including petitioner, were also involved in the extortion conspiracy, the jury's verdict suggests that it did not believe beyond a reasonable doubt that petitioner was a party to the latter conspiracy. Thus, despite the government's allegation that petitioner and his co-conspirators all participated in both conspiracies, the proof at trial, in the eyes of the jury, showed otherwise.

[3] The "totality of the circumstances" test that the courts below applied to determine whether the two agreements were separate is not materially different from the test used by the other circuits. See *United States* v. *Ciancaglini*, No. 88-1438 (3d Cir. Oct. 13, 1988), slip op. 11; *United States* v. *MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986); *United States* v. *Korfant*, 771 F.2d 660, 662 (2d Cir. 1985); *United States* v. *Thomas*, 759 F.2d 659, 661-662 (8th Cir. 1985); *United States* v. *Phillips*, 664 F.2d 971, 1006 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Castro*, 629 F.2d 456, 461 (7th Cir. 1980); *United States* v. *Marable*, 578 F.2d 151, 154 (5th Cir. 1978). Petitioner claims that the decision of the court of appeals in this case conflicts with the decision of the Third Circuit in *United States* v. *Liotard*, 817 F.2d 1074 (1987), because in *Liotard* the court of appeals declined to consider the fact that the two conspiracy counts at issue charged different object offenses (see 817 F.2d at 1078 n.7). There is no conflict between the circuits on this point, for two reasons. First, *Liotard* involved different *object* offenses, not different conspiracy provisions, as in this case. Both prosecutions in *Liotard* were brought under the same conspiracy statute. Second, the Third Circuit recently declined to follow *Liotard*'s limitation in *United States* v. *Ciancaglini*, No. 88-1438 (Oct. 13, 1988), slip op. 11. In *Ciancaglini*, the court suggested that the use of different object offenses could be considered in determining whether separate agreements were charged, as long as the use of different object offenses did not disguise the fact that both alleged conspiracies were based on the same agreement. That rule is no different in practical effect from the rule applied in every circuit to

b. Petitioner raises as a separate argument (Pet. 11-18) the claim that the charged drug conspiracy is a lesser included offense of the extortion conspiracy of which he was acquitted. This contention is simply a restatement in a different form of his claim that the two conspiracies are the "same offense" for double jeopardy purposes. Like the first claim, the "lesser included offense" contention is foreclosed by *Albernaz* v. *United States, supra.* Even if there was only one agreement in this case, neither charged conspiracy can be regarded as a lesser included offense of the other, because the offenses contain distinctly different elements. See *United States* v. *Woodward, supra.*

In addition, this argument is based on a false factual premise. Contrary to petitioner's assertion (Pet. 14), the Hobbs Act conspiracy and the conspiracy to distribute drugs are not factually identical as charged. First, different time frames are spelled out in the extortion conspiracy count and the superseding drug count. Second, contrary to petitioner's contention, the alleged effect on interstate commerce in the Hobbs Act count is not the defendants' "intentional distribution of cocaine." Count 1 charges that the defendants conspired "to obstruct, delay and affect commerce by extortion, that is, by obtaining and attempting to obtain money and cocaine from Houston E. McNeal with his consent, under color of official right." The extortion conspiracy count further alleges that the defendants would offer protection to McNeal for *his* distribution activities in exchange for payment. That is a far cry from the drug conspiracy allegation that the defendants conspired together to possess and distribute drugs themselves. Finally, although Count 1 alleges that the extorted payment to the defendants would

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determine whether two charges brought under the same conspiracy provision constitute one offense or two.

be "money and cocaine," that allegation is plainly not identical to the charge in the drug conspiracy count that the defendants agreed to "possess with intent to distribute controlled substances." Indeed, the allegation in the extortion conspiracy count that the defendants would be paid off in drugs is substantively quite different from an allegation that they would possess drugs for distribution to others.

Nor are the two conspiracy counts based on the same evidence, as petitioner asserts (Pet. 17; see also Pet. 19-20). Petitioner states that "*all* of the evidence that even remotely ties petitioner to the events identified in the original indictment is directly related to the alleged effort to extort Special Agent McNeal" (Pet. 20). Yet the superseding indictment dates back to a time well before Agent McNeal was in the picture. Moreover, the evidence at trial overwhelmingly demonstrated a persistent and ongoing agreement to secure drugs for distribution, and the events involving Agent McNeal occurred during only one phase of the defendants' overall drug activities. As is clear from the facts stated in the opinion of the court of appeals, the evidence concerning the drug distribution conspiracy was largely independent of the extortion conspiracy evidence, and the government could easily prove the Section 846 count without ever mentioning the charged extortion. Thus, to the extent that petitioner suggests a circuit conflict on the "same evidence" standard (see Pet. 17-18), this case does not present a factual basis for resolving that issue.

2. Finally, petitioner claims (Pet. 18-20) that the principles of collateral estoppel bar his impending retrial on drug conspiracy charges.

The facts of this case do not support petitioner's collateral estoppel claim. As petitioner acknowledges, collateral estoppel prohibits a second trial only if the jury

necessarily decided an issue of fact in his favor without which the pending charge cannot be proved. *Ashe* v. *Swenson,* 397 U.S. 436, 443-445 (1970); *United States* v. *Bennett,* 836 F.2d 1314, 1316 (11th Cir. 1988), cert. denied, No. 87-1751 (June 20, 1988); *United States* v. *Head,* 697 F.2d 1200, 1205 (4th Cir. 1982). The defendant bears the burden of identifying the factual issues necessarily decided at the first trial that would preclude his retrial on the remaining charges. *United States* v. *Ragins,* 840 F.2d 1184, 1194 (4th Cir. 1988); *United States* v. *Bennett,* 836 F.2d at 1317 n.1; *United States* v. *Gentile,* 816 F.2d 1157, 1162 (7th Cir. 1987); see also Pet. App. 18a. Petitioner has not identified any element of the drug conspiracy charge that the jury necessarily found in his favor in its extortion conspiracy verdict. He has therefore failed to satisfy his burden of establishing a collateral estoppel bar to retrial.

The district court and the court of appeals correctly found that the acquittal of the Hobbs Act conspiracy might reflect merely that the jury accepted petitioner's defense that he was investigating McNeal or that it did not believe beyond a reasonable doubt that petitioner agreed to extort or actually extorted McNeal. At the same time, the court below correctly concluded that the verdict is not a rejection of the government's case concerning the conspirators' separate and preexisting plan to sell drugs on a large scale. See Pet. App. 29a-30a, 18a-20a. That hypothesis is supported by the lack of evidence corroborating petitioner's accomplice's testimony that money was given to petitioner. Since the explanation is reasonable and petitioner identifies no other facts necessarily found by the jury, petitioner is not entitled to invoke the principles of collateral estoppel.

Moreover, petitioner treats this case as if it were one in which the government had charged him with the extortion

conspiracy, had failed in its effort to win a conviction on that charge, and had then brought a new charge of drug conspiracy. Petitioner's argument ignores the critical differences between a successive-prosecution case of the sort he imagines and the case actually before the Court, which involves a proposed retrial of previously tried charges on which the defendant was *not* acquitted. If the jury necessarily had decided a factual issue relating to the drug conspiracy in petitioner's favor, it would have acquitted him on that charge. But it did not do so. Thus in this case, as in *United States* v. *Bennett,* 836 F.2d at 1317 (footnote omitted),

> [T]he jury verdict bespeaks a distinction between the two conspiracies. The trial judge charged the jury on two conspiracies, and the very fact that the jury did not acquit [petitioner] on all * * * counts and instead disagreed on [one] of the counts implies that at least some members of the jury did not interpret the conspiracies as one. Because the split jury verdict would cohere on the basis that the jury bought [petitioner's] defense for the one conspiracy but not for the other, [it follows] that the jury did not necessarily decide [petitioner's] involvement in the distribution scheme. Therefore, * * * the doctrine of collateral estoppel will not bar retrial * * *.

We submit that the doctrine of collateral estoppel should never bar the retrial of counts that were tried—but did not result in acquittal—before the same jury as the counts giving rise to the collateral estoppel claim. If (as we contend and the lower courts held in this case) there is a logically consistent way for the jury to have acquitted on one count but not on another, then the jury did not necessarily determine facts that require acquittal on the unacquitted counts, and collateral estoppel does not bar

retrial of the unacquitted counts. On the other hand, if (as petitioner contends in this case) there is *no* logically consistent way for the jury to have acquitted on one count but not on another, ~~it did not~~, then we would know that "the same jury reached inconsistent results." *United States* v. *Powell,* 469 U.S. 57, 68 (1984). "[O]nce that is established principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful" (*ibid.*). In such a situation, the defendant has no right to argue that the verdicts of acquittal were "the one[s] the jury 'really meant' " (*ibid.*).[4]

Both of the possible hypotheses lead readily to the same conclusion: there is no collateral estoppel bar to a retrial on the unacquitted counts. A defendant who wins a partial victory in the jury room cannot by operation of law transform that partial victory into the total victory that the first jury refused to give him. See *United States* v. *Citron,* 853 F.2d 1055, 1058 (2d Cir. 1988); *United States* v. *Bennett,* 836 F.2d at 1317; *Hess* v. *Medlock,* 820 F.2d 1368, 1374 (4th Cir. 1987); *United States* v. *Price,* 750 F.2d 363, 366 (5th Cir.), cert. denied, 473 U.S. 904 (1985).[5]

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[4] Petitioner faults the court of appeals for suggesting that the jury might have acquitted him on the extortion conspiracy charges because of leniency (Pet. 20 n.14 (citing Pet. App. 19a)). Petitioner might be right to take the court to task if this were a successive-prosecution case in which the jury that acquitted him of the extortion-related charges had not also heard the drug-related charges, but this is not that case. In a case in which the jury may have acted inconsistently, it is quite proper—indeed, it is imperative—for courts to take into account the possibility that an acquittal was based on jury lenity. See *Powell,* 469 U.S. at 63, 65-66 (quoting *Dunn* v. *United States,* 284 U.S. 390, 393 (1932)).

[5] In *Ohio* v. *Johnson,* 467 U.S. at 500 n.9, this Court wrote that, "in a case such as this, where the State has made no effort to prosecute

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1988

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the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." The present case, like *Ohio* v. *Johnson,* is one in which the government has made no effort to prosecute the charges of Hobbs Act conspiracy and drug conspiracy seriatim. Rather, the government has been forced to try the latter charge separately only because it was not, but the former charge was, resolved when the two were pursued together. It follows from *Ohio* v. *Johnson* that the principles of collateral estoppel are inapplicable here. See also *United States* v. *Ashley Transfer & Storage Co.,* No. 87-5153 (4th Cir. Oct. 3, 1988), slip op. 14.

Petitioner describes this case repeatedly as one involving successive prosecutions (Pet. 6, 15, 16, 17), but, as we have noted, that description no more fits this case than it did *Ohio* v. *Johnson*—which this Court expressly regarded as a case in which the State had not sought to prosecute the charges seriatim. The prosecutions for conspiracy to extort and for conspiracy to distribute drugs in this case, like the prosecutions for murder and for manslaughter in *Ohio* v. *Johnson, supra,* were eventually separated from each other because of what happened in the trial court when the government sought to pursue the charges together, but the element of potential government harassment and oppression that inheres in the notion of successive prosecutions is entirely absent.

U.S. GOVERNMENT PRINTING OFFICE: 1988—241 693 60766

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 88-479

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OCTOBER TERM, 1988

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MARION D. CAMPBELL,
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v.

UNITED STATES OF AMERICA,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## REPLY BRIEF OF PETITIONER

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## REPLY BRIEF OF PETITIONER

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Marion D. Campbell hereby replies to the arguments presented by the United States in opposition to his petition for a writ of certiorari.

1. The underlying question in this case is whether the court of appeals erred in applying the "totality of the circumstances" test to find that the Hobbs Act conspiracy of which Petitioner was acquitted and the drug conspiracy on which the jury failed to reach a verdict constituted separate conspiracies. The United States does not directly challenge Petitioner's criticism of the court of appeals' application of the "totality of the circumstances" test. *See* Pet. Br. at 9-11. Instead, the United States

confines itself to two points. First, the United States cites several cases for the position that "[t]he 'totality of the circumstances' test that the courts below applied . . . is not materially different from the test used by the other circuits." U.S. Br. at 9 n.3. But, Petitioner conceded that, *in form of words*, the Sixth Circuit's test is similar to that used elsewhere in the country. The point, however, is that the Sixth Circuit departed from accepted practice in *applying* this test. The cases cited by the United States only emphasize this difference in application. Although some of the cases cited found allegations of separate conspiracies, all of those cases involved strong indicia of separate conspiracies which are not present here. *See, e.g., United States* v. *Ciancaglini*, No. 88-1438 (3d Cir. Oct. 13, 1988) (only insignificant overlap in time and overt acts). *United States* v. *Korfant*, 771 F.2d 660, 662-63 (2d Cir. 1985) (no meaningful overlap in persons, places or overt acts). By contrast, where, as here, there has been no significant difference between the allegations, the courts have found a single conspiracy. *E.g., United States* v. *Castro*, 629 F.2d 456, 461-64 (7th Cir. 1980); *United States* v. *Marable*, 578 F.2d 151, 154-56 (5th Cir. 1978).

For the most part, the United States attempts to avoid entirely the totality of the circumstances test by simply asserting that "the evidence in this case established two separate agreements." U.S. Br. at 8. Specifically, the United States asserts that Petitioner was engaged in a conspiracy to distribute drugs *before* the alleged extortion conspiracy took shape. *Id.* at 8-9; *see also id.* at 11. However, all of the evidence adduced in support of the alleged drug conspiracy relates to events which took place *before* January 1, 1985. *See* U.S. Br. at 3. This evidence could not have been considered to show, as the original indictment alleged, that Petitioner was engaged in a separate conspiracy to distribute drugs between January 1, 1985 and February 11, 1985. Docket Entry

1. The United States does not and cannot cite any evidence that *during the time period alleged in the original indictment*, there were separate conspiracies to violate the Hobbs Act and to possess drugs with intent to distribute.

The United States' attempt to use evidence of earlier events to demonstrate separate conspiracies starkly illustrates the attack that this case poses upon the individual protections afforded by the Double Jeopardy Clause. The initial indictment in this case proceeded on the theory of a single conspiracy, during a single time period, to distribute drugs and to violate the Hobbs Act. The evidence developed at trial showed that Petitioner did not engage in this single conspiracy, but suggested that a drug conspiracy may in fact have existed prior to the Hobbs Act conspiracy. Following Petitioner's acquittal, the Government now seeks to retry him under the theory of separate conspiracies suggested by the evidence developed during its first case. This practice squarely violates "the principles of finality and prevention of prosecutorial overreaching" that the Double Jeopardy Clause was designed to protect. *Ohio* v. *Johnson*, 467 U.S. 493, 501 (1984). If the United States is permitted to use an initial trial in order to refine its case for retrial, Petitioner would be unfairly "subject[ed] . . . to embarrassment, expense and ordeal and compell[ed] to live in a continuing state of anxiety and insecurity." *Green* v. *United States*, 355 U.S. 184, 187-88 (1957); *cf. Sanabria* v. *United States*, 437 U.S. 54, 73 (1978) ("[t]he Government having charged only a single gambling business, the discrete violations of state law which that business may have committed are not severable in order to avoid the Double Jeopardy Clause's bar on retrials for the 'same offense.' "). This Court should grant a writ of certiorari in order to protect the Double Jeopardy Clause from such erosion.

2. As the United States acknowledges, a defendant may not be prosecuted under two separate statutes for the same course of action unless "each provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). The United States attempts to dismiss the relevance of *Blockburger* to this case by observing that a violation of either the Hobbs Act or Section 846 may sometimes be established without showing a violation of the other. U.S. Br. at 7, 10. This argument, however, ignores *Illinois* v. *Vitale*, 447 U.S. 410 (1980) and *Harris* v. *Oklahoma*, 433 U.S. 682 (1977), both of which established that, in applying *Blockburger*, the court must focus only on the conduct which the Government has *alleged* to satisfy the elements of the statute in question—even if the statute may be violated by any of several means. *See also Whalen* v. *United States*, 445 U.S. 684, 691-92 (1980). Thus, the relevant question here is whether, under the theory used by the Government in this case, proof of Petitioner's participation in a Hobbs Act conspiracy would also constitute proof of a conspiracy to violate Section 846.

The United States further argues that, even focusing only on the conduct alleged in this case, the proof necessary to convict under the Hobbs Act would not necessarily establish a violation of Section 846. U.S. Br. at 10-11. The United States' analysis on this point is, however, erroneous. First, the conspiracy alleged under the Hobbs Act is the same as that alleged under Section 846. *See* Pet. 11-18. Second, proof that Petitioner conspired to affect interstate commerce by protecting Special Agent McNeal's operation to distribute cocaine would fully establish that Petitioner himself conspired to distribute cocaine. Third, this same allegation that Petitioner attempted to obtain a role in Special Agent McNeal's operation would also constitute an effort to possess cocaine as a member of the distribution ring. Thus, the alleged Hobbs Act and Section 846 violations in this case are the

"same offense" under the analysis used in *Vitale* and *Harris*.

3. The United States does not dispute the existence of a conflict among the circuits as to whether a more rigorous standard applies for determining whether two allegations constitute the "same offense" where a case involves successive prosecutions rather than cumulative sentencing. *See* U.S. Br. at 11.[1] The United States asserts, however, that this case does not involve successive prosecutions because the mistrial did not terminate Petitioner's original jeopardy on the Section 846 count. *Id.* at 8, citing *Richardson* v. *United States*, 468 U.S. 317 (1984).[2] This argument simply misses the point. The issue is whether, following acquittal on the Hobbs Act conspiracy, the United States may now recommence Petitioner's prosecution under Section 846. This issue is entirely distinct from the issue of the effect of a mistrial upon retrial of the *same* count that the Court addressed in *Richardson*.[3]

Furthermore, this case is not, as the United States suggests, analogous to *Ohio* v. *Johnson*, 467 U.S. 493

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[1] The United States cites *Garrett* v. *United States*, 471 U.S. 773, 778-79 (1985), apparently for the proposition that *Blockburger* provides the sole test for determining whether two offenses are "the same" in cases of successive prosecution. U.S. Br. at 8. However, this portion of *Garrett* holds only that congressional intent to establish separate offenses is a necessary, but not a sufficient, condition for successive prosecutions. In fact, the *Garrett* Court's contained discussion after its analysis of congressional intent strongly suggests that something more is required in successive prosecution cases. *See Garrett*, 471 U.S. at 786-93.

[2] The United States' further suggestion that this case "does not present a factual basis for resolving" the conflict among the circuits, U.S. Br. at 11, is premised entirely on its erroneous conclusion that the evidence introduced by the Government under the Hobbs Act might not also establish Petitioner's complicity in a drug conspiracy. *See*, p. 4, *supra*.

[3] This distinction was fully recognized by the court of appeals below. Pet. at 9a.

(1984). In *Johnson*, the trial court, over the state's objection, accepted the defendant's guilty pleas to involuntary manslaughter and grand theft and dismissed counts charging him with murder and aggravated robbery. Under these circumstances, the Court held that the Double Jeopardy Clause did not bar the defendant's subsequent trial on the latter charges. The basis for the Court's decision was that "the principles of finality and prevention of prosecutorial overreaching" did not apply because "the State [did not have] the opportunity to marshal its evidence and resources more than once or to have its presentation of the case through a trial." 467 U.S. at 501. Here, by contrast, the unsuccessful effort to prosecute Petitioner under the Hobbs Act has given the United States an unfair opportunity to refine its drug conspiracy case at Petitioner's expense. The concerns for individual rights that underlie the prohibition against multiple prosecutions thus fully apply.

4. In response to Petitioner's showing that his retrial under Section 846 must be barred under principles of collateral estoppel, the United States advances two arguments, both of which must fail. First, the United States asserts that collateral estoppel does not apply because the jury could have found only that Petitioner did not conspire to extort, not that he did not conspire to distribute drugs. U.S. Br. at 12. This argument is premised on the erroneous assumption that the original indictment charged two separate conspiracies. Once that assumption is properly rejected, the United States' argument necessarily fails.

Second, the United States makes the novel assertion that as a matter of law, "the doctrine of collateral estoppel should never bar the retrial of counts that were tried—but did not result in acquittal—before the same jury as the counts giving rise to the collateral estoppel claim." *Id.* at 13. At least as applied to this case, this argument is unsupported either by logic or precedent.

In nearly all of the cases that the United States cites, the courts refused to apply collateral estoppel where a jury had previously inconsistently acquitted a defendant on one count and *convicted* him on another, and the conviction was later vacated on legal grounds.[4] The courts' reasoning in these cases, as the United States correctly notes, was that ordinary deference could not be afforded to the jury's factual finding on acquittal where the jury necessarily simultaneously made a different and *inconsistent* factual finding on another count. *See* U.S. Br. at 14. This problem, however, simply does not arise where, as here, an acquittal coexists with a *mistrial*. In this case, the jury made only one relevant factual finding at petitioner's trial—it found that he did not participate in the conspiracy with which he was charged. Because the jury made no other factual finding which is inconsistent with that one, its verdict must be afforded its full weight as authority.[5]

Significantly, at least two of the cases cited by the United States expressly recognize that, in contrast to the situations presented in those cases, "an acquittal accompanied by a failure to reach a verdict may appro-

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[4] In *United States* v. *Bennett*, 836 F.2d 1314 (11th Cir.), *cert. denied*, 108 S.Ct. 2347 (1988), the court held that collateral estoppel did not bar defendant's retrial where he was acquitted on one count and the jury failed to reach a verdict on another. The basis of the court's decision, however, was that on the facts defendant's acquittal was not necessarily inconsistent with his conviction on the mistried count.

[5] In *United States* v. *Powell*, 469 U.S. 57 (1984), the Court reaffirmed that a conviction is not invalid simply because the jury simultaneously and inconsistently acquitted the defendant on another count. As the Court noted, "once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. Courts have always resisted inquiring into a jury's thought processes . . . ." *Id.* at 67. In this case, the recognized interest in preserving the inviolability of jury verdicts counsels *in favor* of affording full collateral estoppel effect to petitioner's acquittal.

priately give rise to collateral estoppel if the acquittal necessarily determined facts in the defendant's favor." *United States* v. *Citron*, 853 F.2d 1055, 1059 (2d Cir. 1988); *see also United States* v. *Price*, 750 F.2d 363, 365 (5th Cir.), *cert. denied*, 473 U.S. 904 (1985) ("defendant's argument would be stronger had the first jury mistried rather than having convicted him of the conspiracy charge"). In fact, the courts have acquitted consistently applied collateral estoppel principles where juries have acquitted defendants on one count and hung on another. *See United States* v. *Gornto*, 792 F.2d 1028, 1030-31 (11th Cir. 1986); *United States* v. *Mespoulede*, 597 F.2d 329, 336-37 (2d Cir. 1979). Thus, the doctrine of collateral estoppel plainly applies to this case.

The dangerous erosion of double jeopardy and collateral estoppel principle warrants review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 22, 1988

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